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No. 05-

IN THE

Supreme Court of the United States

LOUIS NEWELL,

Petitioner,

v.

DEPARMENT OF MENTAL RETARDATION, AN EXECUTIVE DEPARTMENT OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

DANIEL S. SHARP
ELAINE WHITFIELD SHARP
196 Atlantic Avenue
Marblehead, MA 01945
(781) 639-1862

NORMAN A. PATTIS
Counsel of Record
649 Amity Road
Bethany, CT 06524
(203) 393-3017

Attorneys for Petitioner

201801

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Are judgments on the merits and court-ordered consent decrees the exclusive forms of judicial relief that create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees under 42 U.S.C. § 1988 and *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 121 S. Ct. 1835, 532 U.S. 598 (2001), or can other forms of relief provide the required "judicial imprimatur"?

2. Where a party to a consent decree entered in a federal court under 42 U.S.C. § 1983 successfully enforces that consent decree in a state court, is that party entitled to attorney's fees in the court's discretion under 42 U.S.C. § 1988?

3. Can oral orders constitute the "judicial imprimatur" required for an award of attorney's fees in a civil rights action under 42 U.S.C. § 1983, 42 U.S.C. § 1988, and *Buckhannon*?

4. Did the Supreme Judicial Court of Massachusetts err when it denied attorney's fees under 42 U.S.C. § 1988 and *Buckhannon* to a civil rights litigant who, through a written judicial order and oral orders, (a) achieved some of the benefits he sought in bringing suit and (b) successfully enforced a Section 1983 consent decree?

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B. The Petitioner submits that the Court should decide how *Buckhannon* should be applied to situations in which civil rights litigants are called upon to enforce existing orders or decrees issued pursuant to 42 U.S.C. § 1983. 15

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CITATIONS OF OPINIONS AND ORDERS

The published Supreme Judicial Court of Massachusetts Opinion, 446 Mass. 286; 843 N.E.2d 1084 (March 20, 2006) affirming the Superior Court's denial of attorney's fees. (Appendix, pp. 1a – 34a)

The unpublished Memorandum of Decision and Order on Plaintiff's Request for Injunctive Relief, Motion for Attorney's Fees and Complaint for Civil Contempt issued by the Superior Court (the trial court) on December 1, 2000. (Appendix, pp. 35a – 65a)

BASIS FOR JURISDICTION IN THIS COURT

The decision of the Massachusetts Supreme Judicial Court affirming the trial court's denial of attorney's fees under 42 U.S.C. § 1988 was entered on March 20, 2006. A motion for rehearing was summarily denied on May 1, 2006.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

The decision of the Massachusetts Supreme Judicial Court conflicts with decisions of the U.S. Circuit Courts of Appeal and with this Court's decision in *Buckhannon.* (Rule 10(b).)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Civil Rights Act - 42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the district of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Civil Rights Act - 42 U.S.C. § 1988(b):

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981-of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. . . .

STATEMENT OF WHEN FEDERAL QUESTIONS WERE PRESENTED (RULE 14.1(I))

A claim under the Fourteenth Amendment of the Constitution of the United States and under 42 U.S.C. § 1983 was raised in the Complaint. In a preliminary injunction phase of the case, the plaintiff discovered that he was a member of the "Ricci class" entitled to benefits under a consent decree entered under 42 U.S.C. § 1983. Questions under 42 U.S.C. § 1988 were raised when the plaintiff was awarded relief by the trial court in a post-trial, injunctive phase of the case. Federal questions under 42 U.S.C. § 1983 and 42 U.S.C. § 1988 were the basis of the plaintiff's appeal and were, thus, always extant in the appellate court. The appeal was taken on direct review by the Supreme Judicial Court of Massachusetts.

STATEMENT OF THE CASE

Louis Newell is mentally retarded. He has bee. in the care of the Commonwealth for most of his 66 years.

In June of 1995, Louis lived in a group home run by the Charles River Association for Retarded Citizens ("CRARC"). He fell ill. He was hospitalized at Massachusetts General Hospital ("MGH") and was found to have long excoriations and bruises on his back, as well as a subdural hematoma.

Before being hospitalized, Louis had been very unsteady on his feet and had fallen many times. The bruises and excoriations on his back and the head injury for which he was hospitalized appeared to be caused by a serious fall, or from a beating.

Louis stayed at MGH for months, waiting for a placement from Defendant-DMR. He was transferred by his guardian to a nursing home. Louis did not, at that time, receive assistance from DMR.

In November of 1995, Louis sued CRARC and the Commonwealth under state law and 42 U.S.C. § 1983. He sought compensatory damages, injunctive relief, and appropriate care from the DMR. He sought a preliminary injunction to obtain one-to-one care and supervision from DMR to help prevent his falling and further injuries.

The history of this case actually began years earlier, however, with the U.S. District Court's order in the class action suit of *Ricci v. Okin*, 832 F. Supp. 984 (D. Mass. 1993). *Ricci* was a class action brought against the Commonwealth by mentally retarded citizens such as Newell.

The final order in *Ricci* required DMR to "substantially provide services to each class member on a lifetime basis." *Id.* at 832 F. Supp. 986. Individual class members were given the right to enforce their *Ricci*/Section 1983 rights. *Id.*, at 988. ("Nothing in this [order] shall be construed to prevent a class member from bringing an independent action. . . .")

The complaint in this case was filed under state law and 42 U.S.C. § 1983 (V1, 23, 25) on November 6, 1995. A call for one-on-one care and supervision for Newell was at the heart of the request for relief.

A. Application for Preliminary Relief

The complaint was paired with an application for a preliminary injunction. (V1, 055.) DMR "vigorously" (V1, 194) opposed the application and denied that 1-to-1 care was appropriate. (V1, 197-198.) It denied that Newell was in DMR's custody.[1] (V1, 197, 200.) It denied that DMR had any obligation to provide services to Newell. (V1, 200) ("The plaintiff has no legal right to a DMR placement.") (Also, V1, 206-207.) As DMR services coordinator Mary Reyenger would later concede, Newell would never have had an ISP absent a court order. (V4, 945-946.)

DMR's position that Newell "has no right to a DMR placement" was the equivalent of saying that he was not a member of the *Ricci* class because, if he *was* a member of the class, he was entitled to DMR services "on a lifetime basis." *Ricci*, at 832 F. Supp. 986.

After the lawsuit was filed, on November 22, 1995, the plaintiff obtained a Probate Court order giving Newell's guardian, Eve Ross, access to Newell's DMR-held files. (V2, 367.) Among those files was the first notice the guardian had ever received that Newell was a member of the *Ricci* class. (*See* V2, 368). Yet DMR continued to insist that "[Newell] is not a class member." (V2, 456.) If Newell was *not* a class member, then he had no right to services under *Ricci*.

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1. The court ultimately found that Newell was in state custody since 1946. (*See* Memorandum and Decision.) (V5, pg. 1152)

At a December 7, 1995 hearing on procedural issues, despite the fact that *Ricci* required an Individual Service Plan or "ISP" to identify and plan to meet Newell's needs, the DMR argued that, "[W]e . . . didn't want to put [Newell] through the ISP process." (V2, 398.)

On December 15, 1995, the court "ORDERED that defendant DMR shall complete an accelerated assessment of plaintiff. . . ." (V2, 411.) The trial court would later find that (1) this was the only time Newell received an ISP between "much of 1995 and continuing through the beginning of calendar 2000" (V7, 1565) and (2) that he received the 1996 ISP "only because of a Superior Court order." (V7, 1566.)

On March 1, 1996, the court denied the plaintiff's request for a preliminary injunction. It did so because DMR had "agree[d] to provide a final, Individual Service Plan . . . *within one week*. . . ." Because of that concession, there was "no need for interlocutory relief at this time." (V3, 510.)

B. Discovery and Trial on Damages

On April 2, 1996, the state defendants filed their answer to the complaint. DMR denied that it had any statutory or constitutional obligation to provide Newell with services (V3, 522, para. 168) despite its "agreement" to provide Newell with an ISP in the court order dated March 1, 1996. (V3, 510.)

In the final pre-trial memo, DMR continued to deny that Newell had a right to either "a specific placement or services." (V3, 537.) Also in the pre-trial memo was the question of "what impact, if any, the Ricci decision has on this case." (V3, 542.)

A jury verdict against DMR for $482,600 was returned on December 20, 1999 under state law only. The DMR was granted judgment notwithstanding the verdict under a Massachusetts statute not pertinent to this Petition.

C. The Injunctive Phase of the Case

Next came the injunctive phase of the case under 42 U.S.C. § 1983 and the *Ricci* decision. The trial court ordered DMR to produce an ISP for Newell. (V7, 1566.) ("Two DMR meetings, on December 29, 1999 and February 11, 2000, occurred because there was a court hearing scheduled for 2/17/2000 at which DMR *was to produce* an ISP for Newell.") (*See also* V4, 807.)[2] (Emphasis added.)

At a hearing on February 10, 2000, the court ordered that "the Commonwealth prepare and serve" the ISP by "the end of business on [February 15th]." (V4, 786.) The court also ordered DMR and the nursing home where Mr. Newell was now a resident to increase the frequency of Newell's walking. (V4, 798.) The court ordered that DMR would pay for any costs associated with having Mr. Newell walk more frequently between February 10th and the next hearing date. (V4, 792.)

On February 11, 2000, the DMR did produce an ISP pursuant to the court's December 1999 and February 11th orders. The plaintiff alleged that the ISP was not complete and filed a bench memo to that effect on February 16, 2000. (V4, 807.)

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2. The hearing at which the ISP was ordered was not recorded.

Another hearing on injunctive relief took place on February 17th. One subject of the hearing was the February 11, 2000 ISP. The plaintiff claimed that the ISP was incomplete and, therefore, did not comply with previous court orders. (V4, 807.) During colloquy, the DMR conceded that, "The court, on Thursday, February 10th ordered that this ISP be prepared and filed by February 18th." (V4, 892.)

Mary Reyenger, the Department's ISP coordinator for Mr. Newell, testified that the then-current (but incomplete) February 11th ISP for Mr. Newell was created under court order. (V4, 945-946.)

In a colloquy with Ms. Reyenger, the trial judge said, "I understood that I would be getting an ISP but then DMR hadn't done it. So, I wasn't — I didn't know that it would take more than — that's why I ordered it." (V4, 961.)

Meanwhile, the plaintiff had filed a Memorandum in Support of Request for Injunctive Relief. (V3, 664.) The plaintiff's demands were (1) recognition that Newell was a *Ricci* class member entitled to lifetime services, (2) completion of an ISP under *Ricci*, (3) dental and other medical services, and (4) "some form of one-to-one support and supervision." (V3, 664.) The DMR continued to insist that Newell had "no right" to services of any kind. (V3, 721.)

On March 3, 2000, the plaintiff moved to preserve the issue of attorney's fees. (V5, 1064.)

The court held a hearing on Newell's new ISP on March 29, 2000. DMR Service Coordinator Mary Reyenger conceded that she had not received any funding for Newell's one-to-one care. (V5, 1026, 1031-32.)

After the hearing, the court ordered DMR to (a) provide Newell with 25 hours per week of one-to-one care. (V5, 1041), (b) provide Newell with a private room at that point in time (V5, 1041-42), (c) incorporate into the plaintiff's ISP a letter written by DMR Regional Supervisor Jeff Kielson providing the private room (V5, 1042), and (d) implement Newell's ISP. (V5, 1194.)

DMR continued to object to all such relief, but conceded that "we are going to do it, *if the court orders*." (V5, 1039.) (Emphasis added.)

At a subsequent hearing, the court asked Counsel for DMR, "[Y]ou are not disputing that I ordered A through D, in some fashion?" DMR responded, "In some fashion; no, your Honor. I am not disputing that the Court, in some fashion, ordered A through D." (V5, 1194.)

On April 7, 2000, the Commonwealth submitted a record of the trial exhibits. (V1, 0015.) Among the exhibits was the notice that Plaintiff-Louis Newell was a member of the *Ricci* class. (V5, 1074.)

On April 19, 2000, DMR filed a motion for reconsideration. DMR cited the court's March 29th "order" regarding the March 20, 2000 ISP. (V5, 1127.)

D. DMR is Held in Contempt

A verified complaint for contempt against the DMR was filed by the plaintiff on May 31, 2000. (V1, 0016.) The complaint stated that, "As of May 30, 2000, the Defendant-DMR has failed to comply with any of the provisions of the court's order[s of March 29, 2000]."

On August 10, 2000, the court issued its "Findings of Fact and Order" dated August 10, 2000. The findings included (1) that Newell "is a member of the class of litigants identified for lifetime services in *Ricci*" and (2) the fact that Newell had, through litigation, received a February 11th ISP "with further modification as ordered on March 29, 2000 that substantially complies with the requirements of *Ricci*." (V5, 1149-50.)

The actual contempt hearings began on September 6, 2000. The trial judge referred to her "order[s]" at least eleven times during the hearing. The DMR referred to the court "order[s]" at least six times. (V5, 1171-1247.)

The DMR agreed that, on March 29th, the court had ordered it to (a) provide Newell with 25 hours per week of one-to-one care and supervision, (b) provide Plaintiff-Louis Newell with a private room at that point in time, (c) incorporate into Newell's ISP a letter written by DMR Regional Supervisor Jeff Kielson providing the private room, and (d) Implement Newell's ISP. (V5, 1194.)

The contempt hearing reconvened on September 8th. The court heard argument on the plaintiff's petition for attorney's fees on September 26th. (V7, 1528.)

E. The Court's December 1, 2000 Order

On December 1, 2000, nearly a year after the court ordered DMR to provide Newell with an ISP, the judge issued a 23-page opinion on the issues of contempt, injunctive relief, and attorney's fees. (Appendix, pp. 35a – 65a.) The court found that, "DMR willfully and without excuse failed to obey this Court's order [of March 29, 2000] to incorporate such

provisions into Newell's ISP." (V7, 1581.) The trial court found several ways in which the DMR violated court orders. (V7, 1578-81.)

The December 1, 2000 order required DMR to place language in Mr. Newell's ISP that, "Mr. Newell will have approximately 25 hours a week of one-on-one assistance on both those days that he attends BCTS and those days he does not. . . ." (V7, 1585.) This is precisely the kind of relief that Newell sought when he filed his Complaint.[3]

The court awarded $215,965.80 in attorney's fees and costs (V7, 1585), finding that the "plaintiff's first amended complaint asserted a claim pursuant to 42 U.S.C. § 1983, alleging that Newell was deprived of a liberty interest when DMR failed to provide him with an Individual Service Plan (ISP) as required by *Ricci* . . . and failed to assure his safety without unnecessary restraint." (V7, 1563-64.)

The court determined that "Newell is entitled to lifetime services from DMR in accordance with the requirements of the *Ricci* decision." (V7, 1565.) The court found that, "During much of 1995 and continuing through the beginning of calendar year 2000, DMR failed to provide Newell with an ISP and resulting services despite the requirements of *Ricci* and his being in state custody." (V7, 1565-66.)

On one-to-one care, the court held, "[W]ith respect to the provision of one-to-one care, it appears that DMR has

3. *See* Complaint (V1, 022-054), paras. 50, 70-72, 75, 77, 78, 80-87, 130-132, 136-139, 142, 174, 176, and relief requested #1, #2.) (*See* Application for Preliminary Injunction (V1, 055-059), paras. 4-7, 9-11, 14, 15, 17, 19, and 20.) (*See* final pre-trial order.) (VIII, 551)

not yet incorporated the specific language agreed to by DMR and ordered by this court . . . Accordingly, this court will again order DMR to do so, within twenty days of the entry of this decision. (V7, 1583.)

F. The Appeal and the "*Buckhannon*" Events

The DMR filed its notice of appeal on January 22, 2001. (V1, 0013.) The plaintiff filed his cross-appeal on January 24, 2001. (V1, 0013.)

DMR moved for reconsideration of the award of attorney's fees, relying on the *Buckhannon* decision. (V7, 1591.) The court denied the motion, saying the appeal had divested it of jurisdiction. (V1, 0019.)

The DMR then wrote a letter to the judge, again relying upon *Buckhannon*. (V7, 1595.) On March 18, 2002, the trial court treated the letter as a "motion for reconsideration" and vacated the award of attorney's fees. (V7, 1581.)

The plaintiff responded by filing a revised notice of cross-appeal on April 2, 2002 (V1, 0019) and by filing a notice of appeal on April 5, 2002. (V1, 0019.)

The Supreme Judicial Court affirmed the trial court's decision denying an award of attorney's fees on March 20, 2006.

REASONS FOR GRANTING THE PETITION

When the Court decided *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 121 S. Ct. 1835, 532 U.S. 598 (2001), it relegated the "catalyst theory" for the recovery of attorneys fees under 42 U.S.C. § 1988 to the dust-bin of history.

The catalyst theory had been relied upon by most federal and state trial and appellate courts for at least 20 years. (*See, e.g., Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978)); *Buckhannon*, at 121 S. Ct. 1838 n.3. It comes as no surprise, therefore, that the *Buckhannon* decision left many questions unanswered for the nation's trial and appellate courts.

Buckhannon requires that a court place the "judicial imprimatur" upon the outcome of litigation in order for a party to achieve "prevailing party" status. *Id.* at 532 U.S. 605. Just what constitutes a "judicial imprimatur" has divided the Circuit Courts of Appeal. Whether various forms of relief not mentioned in *Buckhannon* suffice for a party to prevail is currently in dispute.

This case provides an opportunity for the Court to further explicate the meaning of the "judicial imprimatur" to bring greater consistency to state and federal courts in their application of 42 U.S.C. § 1988, and to resolve a conflict among the United States Circuit Courts of appeal.

This is a matter of compelling urgency where civil rights litigation constitutes a large portion of the dockets of the United States District Courts and United States Courts of Appeal.

A. There is a split in authority among the circuits as to what is required to establish the "judicial imprimatur" required by *Buckhannon*. The decision of the Massachusetts Supreme Judicial Court is the result of that uncertainty. This case contains oral orders and written orders that provide the Court with an opportunity to clarify the "judicial imprimatur" and in so doing to create consistency in the law among the nation's trial and appellate courts in an important area of law.

As the court below stated, "[T]here has been some disagreement among Circuit Courts of the United States Court of Appeals whether a judgment on the merits and a court-ordered consent decree are the only forms of relief that meet the 'judicial imprimatur' requirement. . . ." (Appendix, 20a)

In *Pres. Coalition v. Fed. Transit Admin.*, 356 F.3d 444, 451 (2d Cir. 2004), the Second Circuit agreed, saying, "After Buckhannon, courts have split on the kinds of judicial actions that confer prevailing party status." (*See Oil, Chem. & Atomic Workers Union v. DOE*, 351 U.S. App. D.C. 199 (D.C. Cir. 2002) (discussing varying approaches taken by U.S. District Courts as well as Circuit Courts of Appeal.)

The First Circuit has discussed the split of authority without reaching a clear consensus about the approach it will take. *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 23-24 (1st Cir. 2005) (discussing conflicting results among the circuits); *Doe v. Boston Pub. Schs*, 358 F.3d 20, 24 (1st Cir. 2004) (same.)

Some circuits have treated Buckhannon's reference to judgments and consent decrees as mere examples of the types of judicial action that establish prevailing party status. *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003).

By contrast, the Eighth Circuit has read Buckhannon narrowly on this point. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

This case provides the Court with a compelling opportunity to clarify the definition of the "judicial imprimatur" and in so doing, create greater consistency among the nation's trial and appellate courts in an important area of law.

B. The Petitioner submits that the Court should decide how *Buckhannon* should be applied to situations in which civil rights litigants are called upon to enforce existing orders or decrees issued pursuant to 42 U.S.C. § 1983.

The court below gave short shrift to the Petitioner's argument that enforcement of the consent decree established in *Ricci v. Okin*, 823 F. Supp. 984 (D. Mass. 1993) provided him prevailing party status. In so doing, it misinterpreted a portion of Justice Scalia's concurring opinion in *Buckhannon*. (Appendix, 28a.)

The court below failed to grasp how favorably the law looks upon those seeking to enforce civil rights judgments and, in so doing, failed to properly state the controlling rule of law. (S.C. Rule 10.) The plaintiff submits that the Court should provide guidance on how lower courts should apply *Buckhannon* in an "enforcement" situation.

Citing *Burke v. Guiney*, 700 F.2d 767, 771 (1st Cir. 1983), one U.S. District Court recently held that a plaintiff was entitled to attorney's fees for efforts to collect damages for his Section 1983 victory. *Johnson v. Spencer Press of Maine, Inc.*, 2004 U.S. Dist. LEXIS 16560 (D. Me. 2004). The Johnson Court cited numerous cases to support the proposition that "securing compliance" is compensable activity. These included *Balark v. Curtin*, 655 F.2d 798, 802-03 (7th Cir. 1981) (reversing district court's denial of attorney fees for wage-garnishment efforts); *Brinn v. Tidewater Trans. Dist. Comm'n*, 113 F. Supp. 2d 935, 936-38 (E.D. Va. 2000), *aff'd*, 242 F.3d 227 (4th Cir. 2001) (awarding attorney fees incurred in defending against attempt to delay payment of previously awarded attorney fees via motion to amend judgment); *Seibel v. Paolino*, 249 B.R. 384, 386 (E.D. Pa. 2000) (awarding attorney fees incurred in efforts to collect Title VII judgment through bankruptcy dischargeability proceedings); *Dotson v. Chester*, 937 F.2d 920, 932-33 (4th Cir. 1991). Like the prevailing party plaintiffs in the collection cases above, Newell was simply trying to "collect" the benefits to which he was already entitled under *Ricci*.

In a similar vein, in *Miller v. Carson*, 628 F.2d 346 (5th Cir. 1980), class action plaintiffs prevailed in a suit to improve conditions at a county jail. Much later, the plaintiffs' attorneys were awarded fees for enforcing the injunction against the recalcitrant defendant.

A declaratory judgment may support an award of attorney's fees. *Cobell v. Norton*, 407 F. Supp. 2d 140 (D.D.C. 2005) ("[T]he Court's December 21, 1999 declaratory judgment was just that, a judgment or decree and an order from which an appeal lies.") (internal quotations omitted.)

The Eighth Circuit awarded attorney's fees to the plaintiff for his partial success in defending a consent decree in *Cody v. Hillard*, 304 F.3d 767, 775 (8th Cir. 2002). The court found no conflict between *Buckhannon* and the award of post-judgment attorney's fees. The Eighth Circuit, which has read *Buckhannon* narrowly (*See Christina A., supra*), found that the entry of a consent decree twelve years prior to the defendant's motion to dissolve the decree was "clearly a 'judicially sanctioned change' in the parties' relationship that conferred prevailing party status on the class under *Buckhannon*." *Id.* at 773 (citations omitted). In *Cody*, the consent decree enforced was twelve years old. Newell had to defend the consent decree from which he benefited just over two years after the *Ricci* decision was entered by the U.S. District Court.

The Eighth Circuit's *Cody* panel noted that a previously-established prevailing party status extends to postjudgment work only if it is "a necessary adjunct to the initial litigation." The test, it held, is whether the later litigation was "inextricably intertwined with those [issues] on which the plaintiff prevailed in the underlying suit." It held, however, that "work done to defend a remedy for a constitutional violation is inextricably intertwined with the litigation that yielded that remedy." *Id.* at 304 F.3d 775. (citations omitted.)

The Eight Circuit's post-*Buckhannon* analysis is similar to pre-*Buckhannon* analysis by the Fourth Circuit in *Plyler v. Evatt*, 902 F.2d 273, 280-81 (4th Cir. 1990). In *Plyler*, the Fourth Circuit held that once a party has achieved "prevailing party" status by obtaining a consent decree, the extension of that status to post-decree litigation depends on how the later action is related to the initial consent decree. *Id.* at 280. Under *Plyler*, a plaintiff who engages in post-decree litigation that

preserves the "fruits" of the consent decree will be entitled to "prevailing party" status. *Id.* at 281. Such was the case with Louis Newell, particularly where the *Ricci* opinion expressly provided class members the right to enforce the decree in state court. *Ricci*, at 823 F. Supp. 988.

Similarly, in *Barcia v. Sitkin*, 2005 U.S. Dist. LEXIS 13665 (S.D.N.Y. July 7, 2005), the defendants argued that there was no "enforceable alteration of the legal relationship between the parties," even though the plaintiffs successfully opposed a motion to end a consent decree. The district court rejected that argument and called the plaintiffs "prevailing parties" because they obtained an enforceable judgment requiring the defendants to conduct certain hearings in compliance with the consent judgment. The court held that "the judgment, and the ability to enforce it, has altered the legal relationship between the parties. . . ." As argued above, Newell gained the ability to enforce his rights (1) as the result of oral orders made during the course of the hearings on injunctive relief and (2) when the Superior Court entered its written order or December 1, 2000.

In *Thompson v. United States HUD*, 2002 U.S. Dist. LEXIS 23875, 16-19 (D. Md. 2002), the district court ordered post-judgment attorney's fees for monitoring and enforcement activities, calling them the "very sine qua non of the obligations to remedy past discriminatory activity."

On the subject of post-judgment enforcement of civil rights decisions, one court has held:

> There is no suggestion in Buckhannon that the Court intended to overturn its prior precedent on this issue. To the contrary, the distinction drawn

> by the Court in Buckhannon between private settlements and consent decrees, and, in particular, the reference to the "judicial approval and oversight" of the latter implicitly affirms the reasoning of the Court in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 121 S. Ct. at 1840 n.7. Therefore, this Court concludes that the cases holding that a prevailing party may be awarded fees for reasonable monitoring of a court-approved consent decree — with or without subsequent judicial intervention — remain good law.

Burt v. County of Contra Costa, 2001 U.S. Dist. LEXIS 25929 (D. Cal. 2001).

These post-*Buckhannon* cases demonstrate the continuing validity of pre-*Buckhannon* cases such as *Plyler*, *Burke v. Guiney, and Balark v. Curtin* for the proposition that the successful defense of a consent decree can form the basis of an award of attorney's fees.

The trial court's December 1, 2000 order changed the legal relationship of the parties by holding that, "Louis Newell is entitled to life-time services from DMR in accordance with the requirements of the *Ricci* decision." (V7, pg. 1565.)

DMR had long insisted that Newell was not a *Ricci* class member and had failed to provide him with any *Ricci*-required services. The Supreme Judicial Court's decision even describes the extra legal rights that Ricci class members enjoy. (Appendix, pg. 26a n.33.) By finding that Newell is a *Ricci* class member, the Superior Court prevented DMR from denying his membership or reducing his benefits. If DMR

ever tried to reduce or end his benefits, Newell, unlike most DMR clients, would be able to use the findings of fact to prevent such action. He, unlike other DMR clients, would be able to bypass the DMR appeal process and proceed directly to the trial court.

The December 1, 2000 order also changed the legal relationship of the parties by ordering that specific language providing Newell with "approximately 25 hours a week of one-on-one assistance . . ." be included in Mr. Newell's ISP.

By taking this case and deciding these issues, the Court would clarify the relationship of the *Buckhannon* decision to post-trial enforcement efforts. The Petitioner submits that this is an issue worthy of the Court's consideration.

C. Whether oral orders can constitute the required "judicial imprimatur" under *Buckhannon* is an important question for the state and federal trial and appellate courts of the United States. The decision below conflicts with U.S. Circuit law.

The court below acknowledged a split among the federal circuits concerning what can constitute the necessary "judicial imprimatur." The court held, "Whatever the ultimate resolution of that question, no court has concluded that oral statements by a judge . . . not reduced to writing, are sufficient to satisfy the requirement of a 'judicial imprimatur.'" (Appendix, 20a.) This was a misstatement of the controlling federal law. (S.C. Rule 10.)

Fed. R. Civ. P. 52(a) states, *inter alia*, that, "it will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close

of the evidence or appear in an opinion or memorandum of decision filed by the court."

The court below may not have been aware of this rule. It may also not have been aware of *Universal Fidelity LP v. United States of America*, 70 Fed. Cl. 310 (Ct. Cl. 2006), in which an oral order was held to satisfy *Buckhannon*, citing *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025 (Fed. Cir. 2005).

In *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 103 Fed. Appx. 627, 629 (9th Cir. 2004), the Ninth Circuit held that a district court's orders "rest[ing] on factual findings and legal conclusions delivered orally by the district judge" would support "prevailing party" status under *Buckhannon*. Although unpublished, that case reflects the need for the Court's guidance in this area of law.

The Ninth Circuit held that, "Until the case became moot, the orders furnished the precise relief for which Center brought suit." *Id.* The Environmental Protection panel cited the published Ninth Circuit decision in *Davis v. San Francisco*, 890 F.2d 1438, 1451 (9th Cir. 1989) which held that Fed. R. Civ. P. 52(a) "specifically permits the district court to make its findings orally." (*See Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 895 (1st Cir. 1988) ("It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence. . . .", citing Fed. R. Civ. P. 52(a).) (*See In re De Lorean Motor Co.*, 755 F.2d 223 (6th Cir. 1985) (same); *Interpace Corp. v. Philadelphia*, 438 F.2d 401, 404 (3d Cir. 1971) (approving of articulation of reasons for decisions either "orally or in writing."); *Schwarz v. Folloder*, 767 F.2d 125, 133 (5th Cir. 1985) ("Findings of fact, be they written

or oral, need not be syntactically perfect."); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 273 (7th Cir. 1976) (appellate court limited to oral findings and conclusions as they appear in the transcript); *Featherstone v Barash*, 345 F.2d 246 (10th. Cir 1965) (findings of fact may be dictated into record in open court and adopted as such); *Frazier v Coughlin*, 81 F.3d 313 (2d Cir. 1996) (oral opinion found sufficient to support judgment.))

The court below conceded that whether the "judicial imprimatur" exists is purely a question of federal law. (Appendix, 2a.) The court still erroneously found that oral orders could never provide the "judicial imprimatur." But even Massachusetts law appears to be to the contrary. *Commonwealth v. Murphy*, 362 Mass. 542, 544 (1972) (oral orders may be appealed); *Commonwealth v. D'Agostino*, 38 Mass. App. Ct. 206, 207 (1994) (same).

Since oral rulings and orders are uniformly allowed in federal courts under Rule 52(a), and since nothing bars a federal court from issuing oral orders or rulings in a Section 1983 case, oral orders must, per force, constitute the "judicial imprimatur" under federal law.

A fair reading of the transcript shows that DMR did nothing to voluntarily provide Newell with services. The trial court's numerous oral orders to create and modify Newell's ISP and to provide him with benefits was the sole reason why Newell did, ultimately receive benefits.

Those *oral* orders resulting in the ISP gave Newell further procedural rights to protect his services. If DMR reduced his services, he could appeal the alteration. If he disagreed with the results, he could file suit in the trial court. (115 CMR 6.31.)

Once the December 1, 2000 *written* order was issued, Newell's legal relationship with the DMR improved even further. If DMR were to reduce his services, he could bypass the internal procedures of the DMR and immediately file a contempt action, just as he had previously done. He would get to the trial court much faster. The burden of proof would have been more favorable. (*See* M.G.L.c. 30A, Section 14, establishing an "arbitrary and capricious" standard in DMR services review.)

Finally, because Newell could always go to Superior Court in a contempt action after the "25 hours" order of December 1, 2000 was entered, judicial oversight of the order was present. (*See T.D. v. La Grange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003) ("attendant judicial oversight (in the form of continuing jurisdiction to enforce the agreement) may be . . . functionally a consent decree"); *Roberson v. Giuliani*, 346 F.3d 75, 83 (2d Cir. 2003) ("[T]he continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement."))

It would appear that oral orders in this case changed the legal relationship between the parties and constituted the "judicial imprimatur." The Petitioner submits that the Court should use this opportunity to make the relationship of oral orders to the "judicial imprimatur" clear, especially in light of Fed. R. Civ. P. 52(a).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for A Writ of Certiorari and reverse the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

NORMAN A. PATTIS
Counsel of Record
649 Amity Road
Bethany, CT 06524
(203) 393-3017

DANIEL S. SHARP
ELAINE WHITFIELD SHARP
196 Atlantic Avenue
Marblehead, MA 01945
(781) 639-1862

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DECIDED MARCH 20, 2006

SUPREME JUDICIAL COURT OF MASSACHUSETTS

SJC-09439

LOUIS NEWELL[1]

vs.

DEPARTMENT OF MENTAL RETARDATION.

November 7, 2005, Argued
March 20, 2006, Decided

OPINION

MARSHALL, C.J. In *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 600, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (Buckhannon), the United States Supreme Court ruled that "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct" is not a "prevailing party" for purposes of awarding attorney's fees under Federal fee-shifting statutes allowing such awards. The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C.

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1. By his guardian, Eve Ross.

§ 1988 (2000), is one such statute.[2] We transferred this case here on our own motion to consider whether counsel who represented the plaintiff, a mentally retarded and physically vulnerable man, may recover attorney's fees under 42 U.S.C. § 1988. The underlying litigation has been pursued in the Superior Court for more than one decade, and was resolved only when essential services for the plaintiff were finally provided by the Department of Mental Retardation (department). A judge in the Superior Court concluded that the litigation spurred the department to provide the services long denied to the plaintiff: she noted that the plaintiff would "never" have been provided the services "had it not been for this litigation." The issue of the recovery of attorney's fees here is, however, one of Federal law. On a careful review of the voluminous record and with due regard for the legal services provided by counsel to their client to secure basic necessities for him, we conclude that under the command of Buckhannon and its progeny, attorney's fees may not be awarded in this case. We affirm the judge's order vacating her earlier award of attorney's fees.

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2. *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (Buckhannon), concerned whether the plaintiffs were the "prevailing party" under the fee-shifting provisions of the Fair Housing Amendments Act of 1988, 42 U.S.C. § § 3601 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. § § 12101 *et seq.* The United States Supreme Court's reasoning in Buckhannon is presumed to apply generally to Federal fee-shifting statutes that use the term "prevailing party." See, e.g., *Doe v. Boston Pub. Schs.*, 358 F.3d 20, 25 (2004).

Appendix A

Also at issue is the department's appeal challenging a ruling that statements made by the judge during a hearing on the plaintiff's motion for injunctive relief constituted an order enforceable by contempt proceedings.[3] We reverse the judge's order holding the department in contempt and awarding damages to the plaintiff.

1. Background. We summarize the judge's findings of fact, and describe the lengthy procedural history of this case. See *Palmetto Props., Inc. v. County of DuPage*, 375 F.3d 542, 543 (7th Cir. 2004), quoting *McGrath v. Toys "R" Us, Inc.*, 356 F.3d 246, 253 (2d Cir. 2004) (to determine whether award of attorney's fees is appropriate under Buckhannon, "a meticulous analysis of the particular judgments and orders entered in a case is necessary").

The plaintiff is a sixty-six year old severely mentally retarded man with no family. He suffers from Fahr's Disease, a degenerative neurological disorder that causes him to have difficulty walking and maintaining his balance. He has been in the care of the Commonwealth since early childhood. In 1995, while in the department's custody,[4] the plaintiff suffered

3. The judge held the department in contempt for its failure to provide the plaintiff with one-to-one care and a private room by a specific date, April 30, 2000.

4. The department has the responsibility to "take cognizance of all matters affecting the welfare of the mentally retarded citizens of the commonwealth," G. L. c. 19B, § 1, and to "develop and maintain, subject to appropriation and in accordance with its standards, comprehensive community mental retardation services including specialized services for both children and adults." G. L. c. 19B, § 13.

serious injuries, including a head injury, resulting from a series of falls and an assault he suffered while living in a department-sponsored group home, Charles River Association for Retarded Citizens. He was hospitalized at Massachusetts General Hospital (MGH) in June, 1995, and remained there for some six months. Eventually the plaintiff's guardian was required to move him from MGH. Believing that placement in the department-sponsored group home would not be safe for the plaintiff, the guardian transferred the plaintiff to a nursing home over which the department had no control.

In November, 1995, while he was still a patient at MGH, the plaintiff (through his guardian) commenced this action against the department.[5] The plaintiff alleged that injuries suffered in 1994 and 1995 were caused by the department's failure to provide him with an individual service plan (ISP)[6]

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5. Also named as defendants were several department officials, in their individual and official capacities, and the group home where the plaintiff was living at the time of his injuries. The plaintiff later settled his negligence claims against the group home. One of the individual defendants was dismissed from the suit, and a directed verdict was entered in favor of the remaining individual defendants on all claims.

6. The department's regulations in effect at the relevant time and promulgated pursuant to G. L. c. 19B, § 14, and G. L. c. 123B, § 2, provided: "It is the responsibility of the Department and its service providers to engage in service planning, including the provision of preliminary assessments, case management and comprehensive assessments, individual service plans and service referrals, in accordance with the provisions of [104 Code Mass. Regs. § § 16.00] for the benefit of individuals requesting, receiving, and/or referred for mental health services." 104 Code Mass. Regs. § 16.02 (1) (1993).

(Cont'd)

requiring one-to-one care and supervision.[7] The plaintiff asserted various State claims and claims under 42 U.S.C. § 1983, and sought compensatory damages. He also sought injunctive relief ordering the department to place him in an appropriate facility that could provide one-to-one care and supervision.

A request for a preliminary injunction, filed when the action was commenced, was denied in March, 1996, after

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(Cont'd)

An individual service plan (ISP) "shall identify services, programs and service providers based on: 1. the client's needs as identified in the comprehensive assessment; and 2. the availability of specific services." 104 Code Mass. Regs. § 16.05(1) (1993). An ISP "shall include: (a) the client's needs in terms of assessed strengths and weaknesses, including identification of each client's assessed physical health care needs and consideration of the client's preferences regarding services; (b) optimal services to the client which reflect the client's needs without references to existing resources; (c) available services, program and service providers which are, to the maximum extent possible, adequate, appropriate, consistent with the client's needs and least restrictive of the client's freedom; (d) target dates for commencement of each service or date each service commenced; (e) a description of means to ensure that services are provided in a coordinated and complementary manner; (f) a description of the means for monitoring the effectiveness of services to be provided. . . ." 104 Code Mass. Regs. § 16.05(5) (1993).

7. The plaintiff has argued throughout the litigation that the department was required to provide him with one-to-one care and supervision, in part because of his degenerative neurological disorder.

the department agreed to amend the plaintiff's ISP.[8] The case eventually went to trial in December, 1999. A directed verdict was entered in favor of the department on all claims, except one claim for negligence.[9] The jury returned a verdict in favor of the plaintiff on that count, and awarded damages in the amount of $ 482,600 for the injuries he had sustained. On August 29, 2000, the judge allowed the department's motion for judgment notwithstanding the verdict, concluding that the department was immune from liability under

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8. On November 6, 1995, the plaintiff filed a request for a preliminary injunction ordering one-to-one care and supervision. On December 15, 1995, the clerk's office issued a notice of docket entry, which included an order that "[the department] shall complete an accelerated assessment of [the] plaintiff . . . not later than 12/29/95" and that the "plaintiff's guardian shall provide to [the department] any and all medical information in her possession, custody or control." The notice also stated: "On the record before the Court, it is not apparent that one to one care is the only means by which injury to the plaintiff can be avoided."

On January 17, 1996, the judge issued an order requiring that the parties either "complete informal discussions to resolve this case" or "submit their joint or separate proposed orders for an accelerated I.S.P. process for plaintiff." On March 1, 1996, the judge denied the plaintiff's request for injunctive relief, concluding that "[i]n view of the [department's] agreement to provide a final Individual Service Plan under 104 [Code Mass. Regs.] § 16.11 within one week . . . which plan may be appealed by the guardian under 104 [Code Mass. Regs.] § 16.11, the Court determines that there is no need for interlocutory relief at this time" (emphasis added).

9. The defendants' motion for a directed verdict was also allowed on all claims, including negligence, as to the individual defendants. See note 5, supra.

G. L. c. 258, § 10 (j), and that the plaintiff failed to produce sufficient evidence to allow the jury to draw a reasonable inference that the department had been negligent. The plaintiff does not raise any issues related to that order.

At the conclusion of the trial but before the judge's ruling on the department's motion for judgment notwithstanding the verdict, the plaintiff renewed his request for injunctive relief. See note 8, supra. He again sought an order that the department amend the plaintiff's ISP[10] to require the provision of one-to-one care and supervision, and added a claim that the department had violated his rights under a consent decree entered in a class action, *Ricci v. Okin*, 823 F. Supp. 984 (D. Mass. 1993) (Ricci).[11] It is the 2000

10. In 1996, in response to the plaintiff's initial request for injunctive relief, the department amended the plaintiff's ISP. At the time the plaintiff was still in MGH. The 1996 ISP identified the "long range plan" for the plaintiff as living in a community-based residential placement, with one-to-one staffing "during his transition to the community, to be reviewed on a quarterly basis by his ISP Team." Apparently because the plaintiff's guardian and the department could not agree on a suitable residential placement when the plaintiff was discharged from MGH, the department provided no services to the plaintiff between 1996 and 2000. The 1996 ISP was still in place when the plaintiff renewed his request for injunctive relief in 2000. See discussion, infra.

11. *Ricci v. Okin*, 823 F. Supp. 984 (D. Mass. 1993) (Ricci), was a class action brought by mentally retarded citizens against the Commonwealth alleging Federal civil rights violations. The action culminated in a consent decree requiring the Commonwealth to "substantially provide services to each class member on a lifetime basis," *id.* at 986, in accordance with an annual individual service plan that would be provided to each class member.

injunctive relief sought by the plaintiff that forms in large part the basis of his Buckhannon claim. For purposes of resolving those claims, the critical events, which we describe in greater detail below, are as follows: (1) on February 10, February 17, and March 29, 2000, the judge, who had presided at the trial, held hearings on the plaintiff's renewed motion for injunctive relief, and on March 29, she allegedly issued an oral order that is the subject of the contempt claim; (2) on May 31, 2000, the plaintiff filed a complaint for contempt for noncompliance with the judge's March 29, 2000, order; (3) by order dated December 1, 2000, and entered on January 2, 2001, the judge dismissed the plaintiff's request for injunctive relief as moot, awarded attorney's fees to the plaintiff, and held the department in contempt for failure to comply with one aspect of her March order; (4) on January 22 and 24, 2001, respectively, the department filed a notice of appeal, and the plaintiff cross-appealed[12]; (5) on December 31, 2001, the department filed a motion for reconsideration concerning the award of attorney's fees in light of the Supreme Court's decision in Buckhannon, issued after the judge's order on attorney's fees; (6) on March 18, 2002, the judge vacated her award of attorney's fees; (7) on April 2, 2002, the plaintiff filed an amended notice of appeal regarding the vacation of the attorney's fee award.

The focal point of our inquiry is the March 29, 2000, hearing for purposes of both our Buckhannon analysis and

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12. The department appealed from the December 1, 2000, ruling, which awarded the plaintiff attorney's fees under 42 U.S.C. § 1988 and held the department in contempt. The plaintiff appealed from the December 1, 2000, denial of attorney's fees for the contempt action.

the contempt ruling. To place it in context, we review in greater detail the posttrial stages in the litigation, preceding and following that hearing.

As noted earlier, in December, 1999, following the trial, the plaintiff renewed his request for injunctive relief that the department complete a new ISP to require "in particular" some form of one-to-one care and supervision to assure the plaintiff's safety and allow him to live "in the most normal, least restrictive manner possible."[13, 14] At that time, the plaintiff continued to reside in the nursing home where his guardian had placed him after his discharge from MGH. He claimed in his renewed request that the services were required in part because he is a member of the class certified in Ricci. Three hearings on the plaintiff's motion then followed: February 10 and 17, and March 29, 2000. At the February 10 hearing, the department did not contest that an amended ISP was required, but informed the judge that an amended ISP had not been prepared. The judge "ordered" that the

13. The plaintiff claimed that there were only two alternatives for him: one alternative would confine him "to his wheelchair and his bed," and the second would allow him "to walk, with a helping hand, and to enjoy life as best he can." As the judge later found, in preparing a revised ISP, "community participation was then probably the most important ingredient to enable [the plaintiff] to maximize his potential," and the nursing home was unable to provide the plaintiff with access to the community.

14. At a hearing on the plaintiff's motion, the judge ordered the department to evaluate the plaintiff and prepare a new ISP. The department's regulations required that it convene an ISP meeting within ten days, but no later than thirty days, of the completion of the assessment report. See 104 Code Mass. Regs. § 16.05 (2) (1993).

department "prepare and serve on the court and plaintiff's counsel the ISP . . . by the end of business on [February] 15th."[15] At the February 17 hearing, the judge "order[ed]" the department to prepare a "more complete ISP" within three weeks because she was not satisfied with the draft ISP presented to her. Between that date and the next hearing, the department focused on revising and finalizing a new ISP for the plaintiff.

We turn now to the hearing on March 29. By that time the judge had rejected the initial revised ISP presented to her in February, had granted a three-week extension sought by the department, was aware that the department had met with the plaintiff's guardian, and had every expectation that the department would comply with her orders. The judge reviewed a copy of the new ISP prepared by the department, which the plaintiff's guardian had received but had not signed. The new ISP stated that "by April 30th" the plaintiff would have one-to-one care and supervision "for up to twenty-five hours each week."[16] The department's ISP service coordinator[17] testified that funding for the plaintiff's one-to-

15. After a discussion with a physical therapist treating the plaintiff, the judge "order[ed]" in the meantime that the nursing home where the plaintiff resided "continue to do what it is doing," that is, work with the plaintiff to increase his ability to walk, and that the costs be borne by the department.

16. A copy of the 2000 ISP is not included in the record. The judge read the quoted portion from the ISP into the record at the March 29 hearing.

17. According to the ISP service coordinator's testimony, her role at the department is to "coordinate and facilitate" the ISP process,

(Cont'd)

one care had been "approved," and that although she did not know "how the funding works," she had set an April 30 deadline. These represented substantial and important changes to the services the department would provide to the plaintiff. Some ambiguities in the revised ISP needed to be resolved, however. Specifically, the ISP did not provide for a private room for the plaintiff, and counsel expressed concern that the one-to-one care specified in the new ISP was only "up to" twenty-five hours a week when he was not participating in community activities and would therefore force the plaintiff to choose between community activities and one-to-one care. The judge then engaged in a colloquy with the ISP service coordinator who agreed that the plaintiff would receive "approximately" twenty-five hours of one-to-one care per week, and not just "up to" that amount. The judge "asked" the department to amend the existing ISP to include that relief:

> "I am going to ask that [the department] amend this ISP to include . . . that, at the present time, [the plaintiff] has a private room, that he will have his private room, at [the department's] expense, until an appropriate roommate is determined . . .[18] And I am also asking that [the

(Cont'd)

"coordinate services between residential and day providers," "assist people applying for benefits . . . such as . . . food stamps," and "act as an advocate on people's behalf."

18. While living in the department-sponsored group home, the plaintiff had his own private room, but was not receiving one-to-one care and supervision. In the nursing home, the plaintiff was required to share a room with another patient. Access to a private room was one focus of the February and March, 2000, hearings.

> department] amend the [ISP] . . . to just add a sentence . . . that [the plaintiff] will have approximately twenty-five hours a week of one-to-one [care]. . . ."

When the department objected on the grounds that the judge had no authority to determine the content of an ISP, citing *Matter of McKnight*, 406 Mass. 787, 550 N.E.2d 856 (1990), the judge responded that she was "only asking [the department] . . . to put in the ISP, what [the department] has already agreed to." She then specifically inquired whether the department had agreed to provide one-to-one care for approximately twenty-five hours a week, to which counsel for the department responded: "Yes. The service coordinator has agreed to that." Following this exchange the judge then inquired of counsel whether he had any other concerns not addressed in the ISP, to which counsel responded, "No."

As to injunctive relief, because the department had agreed to provide one-to-one care and a private room by April 30, 2000, the judge inquired of plaintiff's counsel that "with the current ISP, you really don't need me to do anything." He responded that "as the result of litigation" counsel had "gotten for [the plaintiff] what we want." He did request that the judge make findings of fact that the plaintiff is a member of the Ricci class, see note 11, supra, and that the department "as a matter of law, [was] required to provide [the plaintiff] services in accordance with the ISP and in accordance with the Ricci-related [regulations]." The judge did not issue a written order following the March 29 hearing.

By April 30, 2000, the one-to-one services for the plaintiff had not been provided, nor apparently had he been moved to a private room in the nursing home. See note 19, infra. On May 31, 2000, the plaintiff filed a complaint for contempt, claiming that the department had failed to comply with the judge's March 29 order. The docket does not reflect any opposition from the department and we have been provided with none. On June 15, 2000, the judge held a hearing on the complaint for contempt, by which time the department had at last amended the plaintiff's ISP to provide for one-to-one care and a private room, the plaintiff had been moved to a private room, and while one-to-one care had not actually commenced, it "[had] very recently been arranged."

At the June hearing, the judge discussed with the parties a date for scheduling a trial on the plaintiff's complaint for contempt. She requested that plaintiff's counsel inform her whether the trial would consist solely of the claim for damages, in light of the fact that the department was, in the words of the plaintiff's counsel, "[c]lose to being" in compliance with the judge's March 29 order, and likely would be fully in compliance by the time of trial.[19]

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19. The judge later found that, as a "direct result" of the department's being served with the complaint for contempt on June 1, 2000, the plaintiff was moved to a private room on June 5, the department produced an ISP that incorporated the provision of a private room and approximately twenty-five hours of one-to-one care on June 13, 2000, and the plaintiff started receiving one-to-one care on June 16.

Appendix A

On September 6 and 8, 2000, the judge held hearings limited to the issue of contempt damages.[20] The department claimed that it was not in contempt of any "order." The department's ISP service coordinator for the plaintiff testified.[21] The judge said she would order a transcript of the March 29 hearing in time for the September 8 hearing. The judge received only three pages of the March 29 transcript

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20. On August 10, 2000, the judge issued an order finding that the plaintiff was a member of the class of litigants entitled to lifetime services under Ricci. She further found that, as "the result of the proceedings in this matter," the department had provided the plaintiff with an ISP ("dated February 11, 2000 as modified on March 29, 2000 and with further modification as ordered on March 29, 2000") that substantially complied with the requirements of Ricci.

21. When asked whether she could "tell us what the court ordered on March 29th, if anything, pertaining to one-to-one visitation and care," the ISP service coordinator responded: "I think that . . . the one-to-one for [the plaintiff] would be in place on April 30." Shortly thereafter, plaintiff's counsel asked the ISP service coordinator again whether she had "any doubt" that the judge had ordered the one-to-one services to commence by April 30. She answered: "I, I'm not sure if I was the one who said it could be done by April 30th or not. To be honest with you, I don't know what — I was saying, 'Yes, I thought it could be done by April 30th.' And I, I don't know if that was a direct order that it had to be done or if it was me saying that's when I, in all good faith, thought that we could have them in place." When plaintiff's counsel pressed her on the same point, she again responded: "I don't recall if it was the [j]udge who ordered it, or if it was what we had put into the ISP and we had all agreed upon."

in time for the September 8 hearing,[22] at which the ISP service coordinator again testified. She confirmed that she was the author of an electronic mail message sent to an attorney in the department after the March 29 hearing, informing the attorney that "the deadline for providing one-to-one services for [the plaintiff was] April 30."

On December 1, 2000, the judge entered a written order on the plaintiff's motion for injunctive relief and his complaint for contempt. She dismissed the plaintiff's request for injunctive relief as moot. She awarded the plaintiff $ 215,965.80 in attorney's fees and costs pursuant to 42 U.S.C. § 1988.[23,24] She held the department in contempt,

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22. The full transcript of the March 29, 2000, hearing was not filed with the court until June 16, 2003.

23. The plaintiff filed his motion for attorney's fees and costs on September 14, 2000.

24. Title 42 U.S.C. § 1988 (2000) authorizes a judge, in her discretion, to award attorney's fees to a prevailing party in civil rights litigation. See id. ("In any action or proceeding to enforce a provision of [42 U.S.C. § 1983] . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs"). See also *Mendoza v. Licensing Bd. of Fall River*, 444 Mass. 188, 209-212, 827 N.E.2d 180 (2005).

Where, as here, a plaintiff brings an action alleging both Federal constitutional claims under § 1983 and State law claims, "the plaintiff need not obtain a final, favorable determination of his constitutional claims in order to claim an attorney's fee under § 1988. It is enough that the constitutional claims are 'substantial,' and arise from the same nucleus of facts on which the State law claims are based."

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and awarded damages to the plaintiff in the amount of $ 10,837.68.[25]

As to the request for attorney's fees under 42 U.S.C. § 1988, the judge concluded that the plaintiff was a "prevailing party" entitled to fees based on the "catalyst theory" because "the plaintiff vindicated his rights without obtaining court-ordered relief" and "the change in the legal relationship between [the department and the plaintiff] was the product of pressures exerted by the present lawsuit." See *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978) ("when plaintiff's lawsuit acts as a 'catalyst' in prompting

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Stratos v. Department of Pub. Welfare, 387 Mass. 312, 317, 439 N.E.2d 778 (1982), citing *Maher v. Gagne*, 448 U.S. 122, 128 n.10, 132 n.15, 100 S. Ct. 2570, 65 L. Ed. 2d 653 (1980). The department does not contest that this standard is met by the plaintiff's claim for injunctive relief.

25. The judge held the department in contempt for its failure to provide the plaintiff with one-to-one care and a private room by April 30, 2000, and awarded the plaintiff damages based on the cost of a private room from April 30 to June 4 and of one-to-one services from April 30 to June 16. With respect to the plaintiff's ISP itself, the judge found that her March 29, 2000, order did not "specify a deadline" by which the department was required to amend the ISP and that her order therefore could not sustain a finding of contempt to that effect. Although the department had incorporated the private room requirement and the twenty-five hours of one-to-one care into the plaintiff's ISP, the judge found that the department had not used specific language "agreed to by [the department]" in the ISP. The judge therefore ordered the department to incorporate specific language into the plaintiff's ISP within thirty days.

defendants to take action to meet plaintiff's claims, attorney's fees are justified despite the lack of judicial involvement in the result"). The department appealed.

On May 29, 2001, the Supreme Court decided Buckhannon. On December 31, 2001, the department moved for reconsideration of the award of attorney's fees to the plaintiff, relying on the holding in that case. After initially declining to rule on the motion because the parties had filed notices of appeal,[26] on March 18, 2002, the judge vacated her award of attorney's fees stating: "Based on the clear language of the [Buckhannon] decision, the legal basis for an award of attorney's fees no longer exists." The plaintiff amended his notice of appeal to include an appeal from this order.

2. Attorney's fees. We consider first the plaintiff's appeal from the judge's order vacating the award of attorney's

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26. The judge initially ruled that she was "divested of jurisdiction to act" on the department's motion for reconsideration because notices of appeal had been filed. On February 19, 2002, an assistant attorney general wrote a letter to the judge arguing that the Superior Court retained jurisdiction on posttrial motions as long as the appeal had not yet been docketed in the Appeals Court. See *Garland v. Beverly Hosp. Corp.*, 48 Mass. App. Ct. 913, 915 n.5, 720 N.E.2d 838 (1999); *Springfield Redevelopment Auth. v. Garcia*, 44 Mass. App. Ct. 432, 435, 691 N.E.2d 965 (1998). See also *Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350, 351 n.2, 759 N.E.2d 714 (2001). Thereafter, on March 18, 2002, the judge treated this letter as a motion for reconsideration and issued her ruling on the department's motion because the appeal had not yet been entered in the Appeals Court. The appeal was entered in the Appeals Court on March 31, 2004.

fees and costs. In Buckhannon, the United States Supreme Court held that for a party to be considered a "prevailing party" under Federal fee-shifting statutes there must be a "material alteration of the legal relationship of the parties," *id.* at 604, quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989), and there must be a "judicial imprimatur on the change," *Buckhannon*, *supra* at 605. The Court rejected the "catalyst theory" then used by most Circuit Courts of the United States Court of Appeals. Id. See, e.g., *Stanton v. Southern Berkshire Regional Sch. Dist.*, 197 F.3d 574, 577 & n.2 (1st Cir. 1999); *Payne v. Board of Educ. of Cleveland City Schs.*, 88 F.3d 392, 397-398 (6th Cir. 1996).

The plaintiff now insists that, even under Buckhannon, he is a "prevailing party." He focuses on the "judicial imprimatur" aspect of the Buckhannon ruling and points to (1) specific statements made by the judge during the February 10 and 17 and March 29, 2000, hearings on his posttrial motion for injunctive relief, and (2) the judge's finding that he was a class member under Ricci. See note 11, supra.[27]

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27. The plaintiff also argues that the pretrial December, 1995, "notice of docket entry" and March 1, 1996, order denying his request for a preliminary injunction, see note 8, supra, are the "functional equivalent of a consent decree" and, therefore, conferred "prevailing party" status on him at that time. This claim is raised for the first time on appeal and is therefore waived. See, e.g., *Porter v. Treasurer & Collector of Taxes of Worcester*, 385 Mass. 335, 338 n.5, 431 N.E.2d 934 (1982), and cases cited. We have reviewed the transcript of the hearing on the motion for attorney's fees and are satisfied the plaintiff did not argue that the 1995 and 1996 actions were the bases

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Appendix A

We review the judge's decision that the plaintiff is not a "prevailing party" de novo. See *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 21 (1st Cir. 2005). Accord *Roberson v. Giuliani*, 346 F.3d 75, 78 (2d Cir. 2003); *Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir. 2002). Contrast *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (reviewing denial of attorney's fees for abuse of discretion where judge construed his own oral order). For the reasons we now explain, we affirm the judge's decision to vacate the award of attorney's fees.

We consider first the "judicial imprimatur" requirement of Buckhannon. The Supreme Court stated that a "defendant's voluntary change in conduct, although perhaps accomplishing

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of his request for attorney's fees. We have not been provided with copies of any of the plaintiff's memoranda in support of his motion for attorney's fees. On the record before us, we agree with the department that the plaintiff has not previously raised this argument.

The plaintiff further argues that because the judge ordered the department to amend his ISP within thirty days of her December 1, 2000, memorandum and order, see note 25, supra, he is a "prevailing party." The order was not clear — the judge initially ordered the department to amend the ISP within twenty days of the entry of her decision, and later in the same order changed that to thirty days. Moreover, according to the judge's findings, the department had already incorporated the private room and one-to-one care requirements into the plaintiff's ISP; the department had simply not used "the specific language agreed to by [the department] and ordered by this Court." We conclude that the December 1, 2000, order did not result in a material alteration of the legal relationship of the parties. See *Buckhannon*, *supra* at 604-605.

what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur." *Buckhannon*, *supra* at 605. The Court then noted that it had "only awarded attorney's fees where the plaintiff has received a judgment on the merits . . . or obtained a court-ordered consent decree." Id., and cases cited. It further noted that attorney's fees had previously not been awarded by the Court where the plaintiff had "secured the reversal of a directed verdict . . . or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by 'judicial relief'" (citations omitted). *Id.* at 605-606. In the wake of Buckhannon, there has been some disagreement among Circuit Courts of the United States Court of Appeals whether a judgment on the merits and a court-ordered consent decree are the only forms of relief that meet the "judicial imprimatur" requirement of Buckhannon, or whether these are merely examples of the types of relief that can confer prevailing party status. See, e.g., *Smith v. Fitchburg Pub. Schs.*, *supra* at 23 (noting disagreement between Eighth Circuit's narrow reading and more expansive reading of Second, Fourth, and Seventh Circuits). Whatever the ultimate resolution of that question, no court has concluded that oral statements by a judge, sometimes couched in hortatory rather than directive terms, and not reduced to writing, are sufficient to satisfy the requirement of a "judicial imprimatur."[28] To the extent a

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28. In rejecting the "catalyst theory," the Buckhannon Court noted that it "spawn[s] a second litigation" requiring "analysis of the defendant's subjective motivations in changing its conduct" (citation omitted). *Buckhannon*, *supra* at 609. Here, the "second litigation" involves interpretation of the judge's own statements. In such a case the judge herself is "in the best position to determine

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claim similar to the one the plaintiff makes here has been asserted, it has been rejected. See, e.g., *New England Regional Council of Carpenters v. Kinton*, *supra* (judge's statements in "extended colloquy" with defendant were not "functional equivalent of a judicial order" where judge entered "no explicit order compelling, or even leading to" change in defendant's behavior).

Buckhannon does not preclude an award of attorney's fees on the basis of settlement agreements that are incorporated into a consent decree. See, e.g., *Carbonell v. Immigration & Naturalization Serv.*, 429 F.3d 894, 901 (9th Cir. 2005) ("when a court incorporates the terms of a voluntary agreement into an order, that order is stamped with sufficient 'judicial imprimatur' for the litigant to qualify as a prevailing party"); *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 165 (3d Cir. 2002) (order incorporating terms of settlement reached during preliminary injunction hearing is "proper vehicle for rendering one side a 'prevailing party'"). See also *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025-1026 (Fed. Cir. 2005) (same); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478-479 (7th Cir. 2003) (same); *Roberson v. Giuliani*, 346 F.3d 75, 81-82 (2d Cir. 2003) (same); *American Disability Ass'n v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir. 2002) (same); *Smyth v. Rivero*, 282 F.3d 268, 280-282 (4th Cir.), cert. denied, 537 U.S. 825, 123 S. Ct. 112, 154 L. Ed. 2d 35 (2002) (same).

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whether [her] statements . . . should be considered as the functional equivalent of a judicial order within the meaning of Buckhannon." *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002).

There was no consent decree here. The judge resolved a dispute between the plaintiff and the department by cajoling (and sometimes ordering) the department to reach agreement with the plaintiff about the terms of the plaintiff's ISP and the services the plaintiff should and would receive. It is clear from our careful review of the February 10 and 17 hearing transcripts that the judge ordered the department to produce a new ISP for the plaintiff, but that there was no order from the judge with respect to the specific content of the ISP.[29] That was the focus of the March 29 hearing. By March 29, the department had agreed in substantial measure to provide the plaintiff with a private room, had approved funding for up to twenty-five hours of one-to-one care and supervision a week, and had incorporated the provision of one-to-one care into the plaintiff's ISP. Although the department challenged the judge's authority to order the department to provide specific services and include them in the plaintiff's ISP, by then the department's ISP service coordinator and other department officials had already agreed to the relief the plaintiff sought. The judge, therefore, saw no need to grant injunctive relief to the plaintiff. Cf. *Toms v. Taft*, 338 F.3d 519, 528-529 (6th Cir. 2003) (although judge was involved in settlement conference, resulting settlement did not bear necessary judicial imprimatur where judge did not issue any order altering defendant's conduct and request for injunctive relief was rendered moot); *T.D. v. LaGrange Sch. Dist. No. 102*, *supra* at 478-479 (involvement in settlement negotiations, including conducting settlement conference in

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29. The department acknowledges that the orders were "to speed up the process of producing a final ISP" and notes that the orders "did not prescribe either the contents of the ISP or the provision of services."

chambers and making certain settlement suggestions, not enough for judicial imprimatur). Contrast *Palmetto Props., Inc. v. County of DuPage*, 375 F.3d 542, 549-551 (7th Cir. 2004) (upholding award of attorney's fees where court made substantive ruling on motion for summary judgment that ordinance was unconstitutional and county voluntarily "repealed the ordinance only after that determination had been made and presumably because of it" [emphasis in original]).

This litigation was the catalyst for the department amending the plaintiff's ISP in the wake of the serious injuries he suffered in the department-sponsored group home, and for providing services to the plaintiff, in particular, the one-to-one services that the plaintiff needed. The judge's role in these hearings resulted in the department's amending the plaintiff's ISP to provide one-to-one care and a private room. The ISP was finally drafted to reflect those terms, but no settlement agreement was drafted or executed, and no order incorporating any such terms was entered. Cf. *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003) (settlement can confer prevailing party status where it is incorporated into court order and where it "[1] contain[s] mandatory language, [2] [is] entitled 'Order,' [3] [bears] the signature of the . . . judge, not the parties' counsel, and [4] provide[s] for judicial enforcement").[30] For

30. In *Preservation Coalition of Erie County v. Federal Transit Admin.*, 356 F.3d 444, 448, 451-452 (2d Cir. 2004), on which the plaintiff relies, the court concluded that a plaintiff had attained "prevailing party" status because a judge ordered the defendants to prepare a supplemental environmental impact statement (SEIS), even

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all of these reasons we conclude that the requisite "judicial imprimatur" is not present in this case.

Even if the judge's statements at the February and March hearings could be construed to satisfy Buckhannon's judicial imprimatur requirement, it is doubtful that there was a "material alteration of the legal relationship," also required by *Buckhannon, supra* at 604. See *Carbonell v. Immigration and Naturalization Serv.*, 429 F.3d 894, 900 (9th Cir. 2005), quoting *Richard S. v. Department of Developmental Servs. of Cal.*, 317 F.3d 1080, 1087 (9th Cir. 2003) (stipulation for stay of deportation materially altered legal relationship of parties "because the defendants were required to do something directly benefitting the plaintiff[] that they otherwise would not have had to do"). From the commencement of this litigation, the department has acknowledged that it has a statutory obligation to provide appropriate care for the plaintiff, and that the care must be reflected in an ISP, see notes 4 and 6, supra. Contrast *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 480 (7th Cir. 2003) (order that school district conduct case-study evaluation to determine plaintiff's eligibility for special

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though the judge declined to issue an injunction. There, unlike this case, the action by the judge in the Federal District Court took the form of a written order in which the judge "ordered" the defendants to prepare the SEIS, as described in the decision, and "to comply" with a series of written requirements. See *Preservation Coalition of Erie County v. Federal Transit Admin.*, 129 F. Supp. 2d 551, 577 (W.D.N.Y. 2000). The court further ordered the parties to appear for a hearing "to discuss in detail" the time frame for the various stages implicated by the SEIS. *Id.* at 578.

education services, which resulted in determination that plaintiff was eligible for such benefits, materially altered legal relationship of parties because school district had not acknowledged plaintiff's eligibility for such services prior to issuance of order). Although the continuing failure of the department to provide appropriate care in the wake of the plaintiff's serious injuries was at the heart of the plaintiff's repeated efforts to obtain injunctive relief, we find nothing in the record to the effect that the department ever refused categorically to provide these services. Foot dragging by an agency, however inexcusable, is not refusal.

There is no claim that Buckhannon does not apply to this case; the plaintiff concedes the point.[31] We recognize that, throughout the litigation, counsel for the plaintiff were proceeding in good faith under then-existing law, which the judge correctly concluded permitted an award of attorney's fees based on the "catalyst theory." See, e.g., *Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978). See also *Buckhannon*, *supra* at 626 n.4 (Ginsburg, J., dissenting) (collecting cases). In the future, counsel who undertake the representation of clients bringing claims under Federal statutes allowing fee shifting will be forewarned that in order to recover attorney's fees, any beneficial arrangements they secure for their clients must be reduced to a written agreement endorsed by a judge. The record in this case is replete with examples of the department and its counsel doing little, if anything, to provide in a timely manner the services to which

31. The Buckhannon rule "must be given full retroactive effect in all cases still open on direct review." *Toms v. Taft*, 338 F.3d 519, 530 (6th Cir. 2003), quoting *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

the department ultimately agreed.[32] While we are not willing to conclude that the department was "being willfully obstructionist," *Smith v. Fitchburg Pub. Schs.*, 401 F.3d 16, 27 (1st Cir. 2005), the time and resources expended by plaintiff's counsel and the judge in obtaining an agreement by the department to provide essential services was greater than necessary.

We now address the plaintiff's claim that the judge's ruling that he is a Ricci class member is a sufficient basis under Buckhannon to confer "prevailing party" status on him.[33] A finding of fact, unaccompanied by a conclusion of

32. On appeal the Department of Mental Retardation was represented by the Attorney General.

33. The department claims that the judge's finding that the plaintiff is a Ricci class member is clearly erroneous. At an early stage of the Ricci proceedings, the judge stated that "a 'class member' is defined as any person residing at or on the residential rolls of one of the [State] institutions . . . on or after the following dates: Belchertown, 2/2/72." *Ricci v. Callahan*, 646 F. Supp. 378, 380 n.2 (D. Mass. 1986). The record reveals that the plaintiff resided in the State institution at Belchertown until May 8, 1967, and was therefore not a class member under this formulation. The 1993 Ricci v. Okin decision, however, also defined class membership to include "the individuals who have been identified in the Class Member Identification List issued as of April 30, 1993, regardless of their current place of residence." *Ricci v. Okin*, 823 F. Supp. 984, 986 n.1 (D. Mass. 1993). The plaintiff claims he was identified in the class member identification list because his file with the department includes a "legal notice" informing him that he is a plaintiff class member in *Ricci v. Okin*, *supra*, and that he is entitled to rights and services guaranteed by the 1993 order in that case.

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law, will usually not work a material alteration of the legal relationship of the parties. Here, the finding by the judge that the plaintiff is a Ricci class member may have clarified the legal relationship between the plaintiff and the department; it did not change the relationship, which had been determined years earlier in the Ricci litigation itself.[34]

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It does not appear that the judge had before her evidence that the plaintiff resided in the Belchertown State institution only until 1967. That evidence was presented to a different judge in 1995. See note 8, supra. She did, however, have a copy of the "legal notice" naming the plaintiff as a Ricci class member. A copy of the class member identification list does not appear in the record. In light of the conflicting evidence we cannot conclude that the judge's finding was clearly erroneous.

34. As required by *Ricci* and the department's current regulations, if the plaintiff's name appears on the class member identification list, he qualifies for "special eligibility" for the department's services. See 115 Code Mass. Regs. § 6.05(1) (2003). "Special eligibility" entitles clients to the same services as clients with "general eligibility," with two exceptions. First, persons with "special eligibility" are entitled to "the least restrictive, most typical, appropriate residential environment, together with the most appropriate treatment, training and support services suited to that person's individual needs." *Ricci v. Okin*, *supra* at 987 n.2. See 115 Code Mass. Regs. § 6.05(2)(e) (2003). Second, persons with "special eligibility" receive priority if the department lacks resources to provide services to all of its clients. See 115 Code Mass. Regs. § 6.07(1)(a) (2003) ("Except as to individuals who have special eligibility pursuant to 115 [Code Mass. Regs. §] 6.05, all supports, including assessments, planning and development and implementation of Individual Service Plans, are subject to the availability of resources").

See note 11, supra. See also *Buckhannon*, *supra* at 613-615 (Scalia, J., concurring) ("prevailing party" status requires "judicial finding" of "the merits of the plaintiff's case" or "of liability").[35] The plaintiff either is or is not a Ricci class member; there is no judicial imprimatur that changed the legal relationship of the parties.

3. Contempt. On March 29, 2000, the judge held a hearing on the plaintiff's motion for injunctive relief to obtain certain services from the department. On appeal, the department argues that the judge abused her discretion in later finding the department in contempt of an order the judge concluded she had issued orally at that hearing, namely, to provide one-to-one care and a private room to the plaintiff by April 30, 2000. There is no dispute that the plaintiff was not in a private room and was not receiving one-to-one services by April 30. But the hearing at which the judge ostensibly issued the order in fact contains no order on the subject. The judge's conclusion that she had issued such an order, a conclusion she reached some six months later without the benefit of the transcript of the March 29 hearing, is clearly

35. The plaintiff's reliance on cases outside the Buckhannon context is inapposite. See *Sumner v. Mata*, 449 U.S. 539, 549, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981) (in habeas corpus context, requirement imposed by Fed. R. Civ. P. 52 on Federal District Court following bench trial to "find the facts specially and state separately its conclusions of law thereon" "undoubtedly makes a judge more aware that it is his own imprimatur that is placed on the findings of fact and conclusions of law"); *Herrick v. Garvey*, 298 F.3d 1184, 1192 (10th Cir. 2002) (describing findings of facts by judges as having "imprimatur that has been stamped upon them by the judicial system" that leads juries to give disproportionate weight to such findings of fact if admitted in evidence).

erroneous in light of the transcript that is now before us. As a result, the judge's finding that the department was in contempt must be reversed.

To hold a party in contempt, "there must be a clear and unequivocal command and an equally clear and undoubted disobedience." *Nickerson v. Dowd*, 342 Mass. 462, 464, 174 N.E.2d 346 (1961). Oral orders may, of course, support a contempt finding. Cf. *Dominick v. Dominick*, 18 Mass. App. Ct. 85, 88-89, 463 N.E.2d 564 (1984) (oral agreement read into record binding on parties). But whether in written or oral form, we determine whether a party is in contempt by looking to the precise words of the order itself. Where the order is oral, we look to the words of the transcript.

In this case, the plaintiff's complaint for contempt alleged that the department had failed to comply with two orders that he claimed the judge had issued orally on March 29: (1) that the department make specific changes in the wording of the plaintiff's ISP, and (2) that certain components of that revised ISP (placement of the plaintiff in a private room and the provision of one-to-one services for approximately twenty-five hours a week) be implemented by April 30, 2000. In her December 1, 2000, memorandum and order on contempt, the judge found that, although she had ordered on March 29 that changes be made in the ISP document, she had not set any deadline for the making of those changes. She therefore concluded that the department could not be held in contempt on that ground. She found contempt solely on the second ground, concluding that on March 29 she had issued an oral order that services be in place by April 30 and that the department had failed to provide the services by that

date. The issue, then, is not whether the judge issued some form of "order" at the March 29 hearing, but whether any such order included a "clear and unequivocal command" setting an April 30 deadline for the implementation of services.

The transcript of the March 29 hearing, which (as we have noted) was not available to the judge before she issued her ruling on contempt, contains nothing resembling an order that the department implement specific services by April 30. That date was contained in the ISP prepared by the department; the transcript reflects only the judge's inquiries as to the funding status that would make April 30 a feasible date for implementation. The department's answer to the judge was that while the ISP service coordinator had put the April 30 date in the ISP and understood that funding had been approved, the service coordinator did not know enough about the details of the funding mechanism to say for certain whether the April 30 date would in fact be met. See note 21, supra. Beyond this colloquy between the judge and the ISP service coordinator, the subject of the April 30 date, and the subject of the funding that would make the April 30 date achievable, did not come up again at any time throughout the remainder of the March 29 hearing. Instead, the judge turned her attention to resolving the two components of the ISP with which plaintiff's counsel remained dissatisfied: the placement of the plaintiff in a private room, and the provision of one-to-one services. After a colloquy between the judge and the department on the one hand, and the judge and the plaintiff on the other, the department confirmed that the service coordinator had agreed to amend the ISP to provide those services, the plaintiff said that this was satisfactory,

and the judge expressed the view that the parties had now "dealt with the ISP."

The judge next addressed how the plaintiff's pending motion for injunctive relief should be resolved, observing that "with the current ISP, you [the plaintiff] really don't need me to do anything." Plaintiff's counsel agreed, but asked that the judge make certain findings about the plaintiff's entitlement to the rights of a Ricci class member and the corresponding right to services under his ISP and the regulations. The judge responded by asking plaintiff's counsel to submit to her proposed findings of fact. Plaintiff's counsel then requested that his motion for injunctive relief be denied as "moot," as opposed to simply being denied. The judge agreed to do so, clarifying that the denial of the plaintiff's motion for injunctive relief as moot was without prejudice to his request for attorney's fees.

From this review of the transcript of the March 29 hearing, it does not appear that the judge ever ordered anything. She sidestepped the department's legal objections to her authority to issue an order modifying the ISP by indicating that she was merely "asking" the department to do what the department had, on its own, already "agreed to." To the extent there was any ambiguity in such terminology, the ultimate resolution of the hearing was that the plaintiff's request for an injunction was denied as moot. What had rendered the motion moot was the department's submission of an ISP and an agreement to make two modifications to the wording of that ISP. At most, the judge had exerted pressure on the department to prevent it from backing off its prior agreement with respect to those two modifications.

Even if one were to interpret this transcript as ordering the department to make the two amendments to the ISP (a point we need not decide, as the department was not found in contempt of that aspect of the ostensible "order"),[36] the transcript contains no order that particular services be implemented by the April 30 date. As noted earlier, the transcript reflects only the judge's inquiries as to the funding status that would make that date feasible. In short, the plaintiff never sought, and the judge never issued, any order that the provisions in the ISP (either the original provisions or the amended provisions) be implemented by any particular date.

The burden of proving contempt is, of course, on the plaintiff. *United States Time Corp. v. G.E.M. of Boston, Inc.*, 345 Mass. 279, 282, 186 N.E.2d 920 (1963). In the case of a disputed oral order, this makes it incumbent on the plaintiff to obtain the transcript and prove the contents of the order. Here, the judge herself recognized that she needed the transcript to determine precisely what she had and had not ordered some six months earlier: during the contempt hearing, she ordered the court reporter to prepare a transcript of the March 29 hearing for that purpose. The department cannot be penalized with contempt when it was a court

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36. The department apparently did understand that some order had issued because it moved for reconsideration of the March 29 "order." The department's motion addressed the judge's ostensible order that the department amend the ISP to include provision of a private room and one-to-one services for the plaintiff, but made no reference to the judge's having ordered a particular implementation date. Just as the record contains no order that services be implemented by April 30, it contains no admission from the department that the order included such a term.

reporter who flouted the judge's order for an immediate transcript. What is clear from the contempt hearing is that the department did not understand that the judge had imposed an obligation on it to provide one-to-one services and a private room for the plaintiff by April 30, 2000.[37]

That the department is not in contempt does not suggest that it is blameless in this affair. To the contrary, the department was under a legal obligation, even without a court order, to make good faith efforts to achieve the objectives set forth in its own ISP, and it failed to do so. And, after the department provided the ISP containing the April 30 date to the plaintiff's counsel, counsel relied on that date in effectively withdrawing his request for injunctive relief. The

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37. The plaintiff points to the ISP service coordinator's electronic mail message (e-mail) as evidence that the department understood that the judge had entered that order. In her testimony at the contempt hearing, the ISP service coordinator confirmed that the first sentence of the e-mail in question reflects that "[t]he start date [the ISP service coordinator] gave the [c]ourt was April 30th." That is an accurate reflection of what is contained in the transcript of the March 29 hearing, where the coordinator indicated to the judge that she had put the April 30 date in the ISP and explained her expectation, but not certainty, that the funding would be in place by that time. In another question posed to the ISP service coordinator at the contempt hearing, the plaintiff's counsel, referring to the same e-mail, asked her if it reflected that she, the service coordinator, gave "the deadline for providing services to [the plaintiff] as April 30th." She answered in the affirmative. This does not, by itself, indicate that any "deadline" was imposed by the judge. The e-mail establishes nothing more than what the transcript of the March 29 hearing establishes, i.e., that the ISP service coordinator made certain representations to the judge at the March 29 hearing about the April 30 date that was already set in the ISP.

department's failure to provide services by the date given to counsel in the ISP and at the hearing is in essence a breach of an agreement with the plaintiff. Finally, having made representations to the judge to the effect that, if funding were in place, the services would be provided by April 30, the department failed to honor that representation. These are serious forms of misconduct, but in the absence of an express court order, this misconduct cannot be elevated to a contempt of court. We therefore reverse that portion of the judge's order holding the department in contempt and awarding damages to the plaintiff.

So ordered.

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE COMMONWEALTH OF MASSACHUSETTS DATED DECEMBER 1, 2000

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CIVIL ACTION NO.
95-6556D

LOUIS NEWELL, by his guardian EVE ROSS,

Plaintiff,

vs.

DEPARTMENT OF MENTAL RETARDATION & others[1],

Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF. MOTION FOR ATTORNEY'S FEES AND COMPLAINT FOR CIVIL CONTEMPT

INTRODUCTION

This action is before the court on an application by the plaintiff for injunctive relief, challenging DMR's placement

1. DMR Commissioner Philip Campbell in his individual and official capacities, DMR Director Jeffrey Keilson in his individual and official capacities, and James Regan, DMR Director of Residential Services, Metro Boston Region, in his individual and official capacities.

and staffing decisions with respect to the plaintiff on the ground that DMR's actions violated 42 U.S.C. § 1983 and G.L. c. 19B, §§ 12-13 *et seq.* Also before the court is plaintiff's motion for an award of attorney's fees and costs pursuant to 42 U.S.C. § 1988. Finally, the plaintiff has filed a complaint for civil contempt, alleging that DMR has failed to comply with a March 29, 2000 order of this Court.

GENERAL BACKGROUND

The plaintiff Louis Newell, a 53 year old mentally retarded man who has been in the custody of DMR since age 7, filed suit against DMR in 1995. The plaintiffs first amended complaint asserted a claim pursuant to 42 U.S.C. § 1983, alleging that Newell was deprived of a liberty interest when DMR failed to provide him with an Individual Service Plan (ISP) as required by *Ricci v. Okin*, 823 F. Supp. 984 (D. Mass. 1993) and failed to assure his reasonable safety without unnecessary restraint.

The plaintiff's second amended complaint stated a claim pursuant to 42 U.S.C. § 1983, alleging that DMR's failure to provide Newell with appropriate care and services deprived him of substantive due process under the Fourteenth Amendment and the Massachusetts Declaration of Rights, and violated G.L. c. 19B, § § 12-13 *et seq.*, requiring the provision of specialized community mental retardation services and reasonable habilitation. In addition, the complaint alleged that DMR was negligent in failing to provide for Newell's safety, failing to provide services such as one-on-one supervision, and failing to prevent another patient from assaulting him. On December 20, 1999, this

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Court granted a directed verdict in favor of all defendants on all claims being tried before the jury except for the negligence claims against DMR. The case then went to the jury on the theory that DMR's negligence caused Newell to suffer personal injury on three occasions: September 14, 1994, September 28, 1994 and June 23, 1995. On 12/21/99, the jury returned verdicts in Newell's favor and awarded him damages of $1,600, $9,500 and $457,000 for his injuries on each of those occasions. After the jury verdict, and at a hearing on the plaintiff's request for injunctive relief, this Court ordered DMR to evaluate Newell and prepare a new ISP. Thereafter, in a Memorandum of Decision and Order dated August 28, 2000, this Court ordered the entry of judgment notwithstanding the verdict for the Commonwealth on the plaintiff's negligence claims.

I. PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF

BACKGROUND.

In January of 2000, the plaintiff sought an injunction requiring DMR to provide Newell with lifetime services as required by *Ricci* v. *Okin*, 823 F. Supp. 984 (D. Mass. 1993), as well as to complete an ISP in accordance with the relevant Massachusetts Regulations, provide him with dental and other medical services identified as needs in previous ISP assessments, and provide him with some form of one-on-one supervision.

In addition to the evidence presented during the jury trial, a hearing was held on February 17, 2000 on the plaintiff's claim for injunctive relief. Witnesses called at that hearing

by the plaintiff were guardian Eve Ross and Mark Bugden, an employee at the Benjamin Health Center where Newell lives. Testifying for the Commonwealth was the plaintiffs service coordinator Mary Reyenger. At the end of that hearing, Ms. Reyenger requested and was granted by this court an additional three weeks to finish a "more complete ISP." She was not satisfied with the ISP dated 2/11/00. When the hearing resumed on March 29, 2000, the plaintiff indicated that he was satisfied with the current ISP except that it should include references to Newell receiving both a private room and up to 5 hours of one-on-one individual care a day, up to 25 hours a week. Although never reduced to writing, it is clear from a transcript of that hearing that the Commonwealth understood that, as outlined in that ISP and DMR correspondence, the Commonwealth was agreeing to provide the plaintiff with both a private room and up to approximately 25 hours a week of one-on-one care, both of which were to be specifically included in a revised ISP and that both were to be provided by DMR by April 30, 2000.

FINDINGS OF FACT

Based on the testimony presented by the parties at the evidentiary hearings on 2/17/00 and 3/29/00, and the reasonable inferences drawn from such evidence, this court makes the following findings of fact:

Louis Newell is entitled to life-time services from DMR in accordance with the requirements of the *Ricci* decision. Under *Ricci*, DMR must provide Newell with specific services as set forth in an ISP depending upon his capabilities

and needs, including residential and day programs, recreational and leisure activities, medical, psychological, dental and health-related services, adaptive equipment, and transportation services. During much of 1995 and continuing through the beginning of calendar year 2000, DMR failed to provide Newell with an ISP and resulting services despite the requirements of *Ricci* and his being in state custody. Only because of a Superior Court order, DMR did provide Newell with an ISP during calendar year 1996.

After the jury trial which resulted in a verdict for the plaintiff on 12/21/99, this Court scheduled a hearing on the plaintiffs claim for injunctive relief and his claim that DMR provide him with a new ISP. Two DMR meetings, on December 29, 1999 and February 11, 2000, occurred because there was a court hearing scheduled for 2/17/00 at which DMR was to produce an ISP for Newell.

In preparing the plaintiff's ISP, Mary Reyenger, the plaintiff's service coordinator at DMR, participated in a team meeting on December 29, 1999 which included the plaintiff's guardian, Eve Ross; a psychologist, Randall R. Perry; DMR Regional Attorney Jackie Berman; Carol Walsh, a nurse; and Bruce Turansky of DMR. The focus of that meeting of December 29, 1999 was how to enable the plaintiff to get out into the community. Ms. Reyenger knew and understood that the December 29, 1999 meeting was in response to a court schedule. She had not done anything to prepare for the ISP meeting, as prior to the meeting she had not yet been told that she was to prepare the plaintiff's ISP or that she was to prepare it by a certain date.

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Eve Ross and Mark Bugden attended a second DMR meeting on February 11, 2000 run by Ms. Reyenger. Al Soto, the plaintiff's physical therapy assistant, also participated in a portion of this meeting. Part of the discussion concerned the number of hours Newell should have one-on-one care. Bugden told Reyenger not to put down any specific number of hours. Bugden expressed that he did not realistically expect that Newell's "support person" for one-on-one care would be coming from Benjamin because of its current staffing level. Mr. Bugden also expressed satisfaction with the plaintiff's condition concerning safety, even though he knows that Newell sometimes falls when trying to walk. Bugden agreed that the plaintiff's safety would be improved if he had one-on-one care with activities of daily living. According to Bugden, the plaintiff has fallen once or twice a month since he has been at Benjamin. They also discussed whether Newell needed a private room and Newell's desired goals including, as advocated by his guardian, community membership and should be addressed in his ISP. Ms. Ross expressed satisfaction with Medicaid's payment for Newell's care at the Benjamin Health Center and with the Benjamin Health Center itself, except for the lack of both a day program and one-on-one care for the plaintiff for a certain time period. Ms. Ross also expressed that the $60 a month the plaintiff receives from Medicaid minimally satisfied his clothing and personal care needs.

The Commonwealth's witness, Mary Reyenger, has been an individual service coordinator at DMR since 1985. Her job is to coordinate ISPs and services of residential and day care providers and to arrange benefits. She became Newell's service coordinator in 1994 and then began seeing him once

a month. Since this lawsuit was filed, she has seen him approximately twice a year, around Christmas and around his birthday. Benjamin Health Center is a nursing home which is unable to provide Newell with access to the community. Newell appreciates having his own room because of past instability in roommates. He comes and goes throughout the entire Benjamin Health Center and participates in a lot of the activities Benjamin offers. Reyenger and Ross agreed, and I find, that community participation was then probably the most important ingredient to enable Newell to maximize his potential. Reyenger tried to provide him with both a day program and a support person to take him out for a couple of hours each weekend day. She agreed that the Boston Center for Therapeutic Services (BCTS) would be a good program for Newell, especially as it has a nurse on site at all times and some peers for him. It offers a lot of activities to enhance Newell's motor skills, as well as art, music, physical and occupational speech therapy. Reyenger agreed that because Benjamin is a nursing home, it cannot provide as much access to the community for Newell and that DMR needs to make more of an effort to get him out in the community.

In preparing Newell's ISP, Reyenger reviewed an occupational therapy evaluation and report by Tom Avery dated January 7, 2000, a neurological evaluation dated January 10, 2000, a fax from nurse Carol Walsh of Liberty Health Care dated January 31, 2000, and a report from Douglas Goldman, a forensic psychologist specializing in child and adolescent psychology, especially those who are mentally retarded. Reyenger prepared an initial ISP dated 2/11/00 but wanted more time to prepare a more complete ISP. At the hearing on 2/17/00, Reyenger requested and was

granted an additional three weeks to complete the ISP. The hearing was then continued to March 29, 2000.

At the hearing on March 29, 2000, Newell's counsel expressed satisfaction with BCTS, the day program where Newell had started going three days a week, and satisfaction generally with Newell's ISP except that the single room which he currently has was not incorporated into the ISP. Counsel also expressed concern that one-on-one care up to 5 hours a day, up to 25 hours a week, was also not included the ISP. Both of these items one-on-one care and a private room, were already part of what DMR had explicitly agreed to provide for now to the plaintiff; they just had not been mentioned in his ISP. After a discussion, this Court explicitly asked DMR to include those two elements in a revised ISP for Newell.

As a direct result of this lawsuit, Mr. Newell has been participating in a day program at BCTS and has for now been provided with a private room and approximately 25 hours a week of one-on-one care. DMR never would have agreed to provide, and Newell would never have received, either the private room or the one-on-one care he ultimately obtained had it not been for this litigation. I find that these changes have vastly improved the quality of plaintiff's life compared to what it was when this lawsuit was filed in 1995, plaintiff having been allowed by DMR to languish in 1995 at Massachusetts General Hospital for over six months.

DISCUSSION

Newell is a member of the class of litigants identified for lifetime services from DMR in *Ricci v. Okin*, 823 F. Supp. 984 (D. Mass. 1993). As a result of the proceedings in this matter, DMR has provided Newell with an individual support

plan (ISP) dated February 11, 2000 as modified and presented to the court on March 29, 2000 and with further modification as ordered by this court on March 29, 2000 that substantially complies with the requirements of *Ricci.* Because defendant DMR has now complied with *Ricci* and the plaintiff has indicated satisfaction with the revised February 11, 2000 ISP and subsequent changes in Newell's care, this Court finds that the request for permanent injunctive relief has been rendered moot. See, e.g., *Massachusetts Bay Trans. Auth.* v. *Local 589, Amalgamated Transit Union*, 406 Mass. 36, 45 (1989); *Morgan* v. *Stoughton*, 18 Mass. App. Ct. 977, 979 (1984).

II. PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

Having received the desired changes in DMR's care of Mr. Newell as a direct result of this lawsuit, the plaintiff now moves for an award of attorney's fees and costs pursuant to 42 U.S.C. § 1988.

DISCUSSION

Section 1988 of 42 U.S.C. authorizes a judge, in her discretion, to award reasonable attorney's fees and costs to a prevailing party in any action to enforce a provision of § 1983.[2] *Kadlick* v. *Department of Mental Health*, 431 Mass. 850, 852 (2000). The purpose of § 1988 is both to promote

2. Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within (Cont'd)

civil rights enforcement and to deter civil rights violators by encouraging private lawsuits aimed against civil rights abuses. *Kadick* v. *Department of Mental Health*, 431 Mass. at 852.[3]

In order to recover attorney's fees under 42 U.S.C. § 1988, the applicant must be considered a "prevailing party" in the litigation. *Kadlick* v. *Department of Mental Health*, 431 Mass. at 852; *Draper* v. *Town Clerk of Greenfield*, 384 Mass. 444, 452 (1981), cert. den., 456 U.S. 947 (1982). A plaintiff is a prevailing party if he succeeds on any significant issue in litigation which achieves some of the benefit he sought in bringing suit. *Hensley* v. *Eckerhart*. 461 U.S. 424, 433 (1983); *Kadlick* v. *Department of Mental Health*, 431 Mass. at 853; *Cronin* v. *Tewksbury*, 405 Mass. 74, 76 (1989); *Draper* v. *Town Clerk of Greenfield*, 384 Mass. at 453. See, e.g., *Cronin* v. *Tewksbury*, 405 Mass. at 76 (concluding that plaintiffs were prevailing parties where they were awarded permanent injunctive relief enjoining a town's appropriation); *Miller* v. *Commissioner of Correction*, 36

(Cont'd)

the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the-party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (1994).

3. DMR's argument that an award of attorney's fees is precluded by Mass. R. Civ. P. 54(d) is frivolous. Rule 54(d) provides that an award of costs against the Commonwealth requires specific, affirmative authority. However, 42 U.S.C. § 1988 clearly authorizes an award of attorney's fees and costs against the Commonwealth in a § 1983 action, whether that action is brought in federal or state Court.

Mass. App. Ct. 114, 117, rev. den., 417 Mass. 1106 (1994) (concluding that plaintiff was a prevailing party where he obtained a permanent injunction requiring the defendant department to comply with its own regulations); *Pearson* v. *Fair*, 980 F.2d 37, 45 (5th Cir. 1992) (concluding that plaintiff inmates were prevailing parties where their lawsuit prompted the court to order that the defendant adopt an isolation policy in compliance with a previously entered consent decree); *Rogers* v. *Okin*, 821 F.2d 22, 25 (1st Cir. 1987) (concluding that mental patents who failed to recover damages for forcible medication and seclusion in non-emergency situations were prevailing parties where they obtained injunctive relief).

The present case has not ended with a court ordered judgment in favor of the plaintiff, insofar as this Court has dismissed the plaintiff's request for injunctive relief as moot.[4] Nonetheless, a plaintiff maybe considered a prevailing party for attorney's fees purposes if his suit had a catalytic effect in bringing about a desired result and the plaintiff's constitutional claim was not frivolous, unreasonable or groundless. *Guardianship of Hurley*, 394 Mass. 554, 559 (1985); *Pearson* v. *Fair*, 980 F.2d at 43; *Nadeau* v. *Hellremoe*, 581 F.2d 275, 279 (1st Cir. 1978). The plaintiff must first show causation: i.e., that his lawsuit was a necessary and important factor in achieving improvements undertaken by the defendant on the plaintiff's behalf. *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987); *Williams* v. *Hanover Housing Auth.*, 113 F.3d 1294, 1299 (1st Cir. 1997); *Pearson* v. *Fair*,

4. Clearly, the plaintiff did not prevail on the negligence claim, as this Court entered judgment for DMR notwithstanding the jury's verdict.

980 F.2d at 44. The plaintiff must thus demonstrate that the defendant did not act gratuitously. *Williams* v. *Hanover Housing Auth.*, 113 F.3d at 1299. The lawsuit need not be the sole cause of the defendant's remedial actions, but must be a competent producing cause of those actions or play a provocative role in the calculus of relief. *Williams* v. *Hanover Housing Auth.*, 113 F.3d at 1299; *Guglietti* v. *Secretary of Health & Human Services*, 900 F.2d 397, 401 (5th Cir. 1990). In addition, the plaintiff must show materiality: that whatever changes his law suit prompted were not de minimis. At a minimum, the plaintiff must show a resolution of the dispute which changes the legal relationship between himself and the defendant. *Texas Teachers* v. *Garland School Dist.*, 489 U.S. 782, 792 (1989); *Pearson* v. *Fair*, 980 F.2d at 45.

In the present case, as a direct result of the assertion of the plaintiff's § 1983 claim, the post-trial proceedings with respect to the plaintiff's request for injunctive relief, and the plaintiff's filing of a complaint for contempt, DMR has now provided Newell with services and an ISP which substantially complies with the requirements of *Ricci* v. *Okin*, 823 F. Supp. 984 (D. Mass. 1993). DMR Service Coordinator Mary Reyenger testified and I find that Newell would never have received the private room and one-on-one care he ultimately obtained had it not been for this litigation. Thus, the change in the legal relationship between DMR and Newell was the product of pressures exerted by the present lawsuit, and was not merely gratuitous on the part of DMR. See *Handy* v. *Penal Institutions Commissioner of Boston*, 412 Mass. 759, 765 (1992); *Williams* v. *Hanover Housing Auth.*, 113 F.3d at 1309. Moreover, the results achieved by the plaintiff in this case are not merely de minimis; rather, DMR's treatment of

Newell has been materially changed to his benefit. Finally, the plaintiffs claim that DMR's failure to provide with him with an ISP as required by *Ricci* deprived him of a liberty interest was not frivolous, unreasonable or groundless.

Notwithstanding that the plaintiff vindicated his rights without obtaining court-ordered relief, his lawsuit, based largely on the § 1983 claim, was a necessary and important factor in changing the legal relationship between DMR and Newell, achieving the completion of an appropriate ISP and the concomitant improvements that he sought in his care. Accordingly, this Court concludes that Newell is a prevailing party within the meaning of 42 U.S.C. § 1988.

Notwithstanding the Commonwealth's arguments, once the plaintiff meets his burden of demonstrating that he is a prevailing party, the court's discretion to deny fees is limited. *Kadlick* v. *Department of Mental Health*, 431 Mass. at 853-54; *Miller* v. *Commissioner of Correction*, 36 Mass. App. Ct. at 120. A successful plaintiff should ordinarily recover fees unless special circumstances would render such an award unjust. *Kadlick* v. *Department of Mental Health*, 431 Mass. at 853; *Draper* v. *Town Clerk of Greenfield*, 384 Mass. at 454; *Stratos* v. *Department of Public Welfare*, 387 Mass. 312, 320 (1982). Neither the limited benefits achieved by an action nor the burden on state taxpayers of an award justifies the denial of fees. *Kadlick* v. *Department of Mental Health*, 431 Mass. at 854; *Draper* v. *Town Clerk of Greenfield*, 384 Mass. at 455-456; *Stratos* v. *Department of Public Welfare*, 387 Mass. at 320. In the present case, this Court finds no special circumstances justifying a denial of fees.

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Section 1988 provides that a "reasonable" attorney's fee shall be awarded. In setting a reasonable fee, the court should employ the lodestar approach, deriving a figure by multiplying a reasonable hourly rate by the hours reasonably spent. *Stratos* v. *Department of Public Welfare*, 387 Mass. at 322. The plaintiff bears the burden of demonstrating that the claimed rate and the number of hours spent on the case are reasonable. *Society of Jesus of New England* v. *Boston Landmarks Commission*, 411 Mass. 754, 759 (1992).

Calculation of a reasonable hourly rate should begin with the average rates in the attorney's community for similar work by attorneys of similar experience. *Stratos* v. *Department of Public Welfare*, 387 Mass. at 323. The prevailing community rate may be modified to take into account the attorney's skill, experience, ability and reputation; the preclusive effect that the case had on counsel's ability to take on other work; the contingent nature of the litigation; any unusual time pressures involved in the litigation; the undesirability of being associated with the case; the length of the litigant's and counsel's professional relationship; and awards in similar cases. *Stratos* v. *Department of Public Welfare*, 387 Mass. at 323; *Draper* v. *Town Clerk of Greenfield*, 384 Mass.

Given that § 1988 authorizes an award of "reasonable" fees, the court should examine an application for fees critically to ensure overall fairness, even in the absence of specific objections by the defendant, particularly where public funds are involved. *Foley* v. *Lowell*, 948 F.2d 10,19 (1st Cir. 1991). See also *Hensley* v. *Eckerhart*, 461 U.S. at 433-434; *Pearson* v. *Fair*, 980 F.2d at 47.

Thus, although the Commonwealth did not object to either the hourly rate or hours expended claimed by the plaintiff, this Court must make its own determination of reasonableness.

The plaintiff's attorney in this case was Daniel Sharp, a partner in Whitfield Sharp & Sharp. Attorney Sharp has been engaged in the general practice of law since 1986, including criminal, police misconduct and employment cases. Co-counsel in this case was Elaine Whitfield Sharp, a partner in the same firm, who has been engaged in the practice of law since 1987, including civil rights, criminal, and head injury cases. Attorney Sharp billed for his services in this matter at an hourly rate of $200 for all work performed between 1995 and 2000. Attorney Whitfield Sharp also billed for her services at an hourly rate of $200 for all work performed between 1995 and 2000.

This Court finds an hourly rate of $200 to be fair and reasonable and commensurate with rates charged by other practitioners of similar experience in the Boston area with respect to work performed from 1999 forward. However, this Court finds $200 to be excessive for work performed between 1995 and 1998, and will award an hourly rate of $175 for those years. In addition, counsel charged an hourly rate of $35 per hour for secretarial services, which this Court finds to be reasonable, and an hourly rate of $75 for paralegal services, which this Court finds to be excessive. Accordingly, this Court will allow an hourly rate of $50 for paralegal services.

Appendix B

In determining a reasonable time expenditure, the court should consider whether the time documented by the attorney was reasonable in light of the difficulty of the case and the results obtained. *Society of Jesus of New England* v. *Boston Landmarks Commission*. 411 Mass. at 759; *Stratos* v. *Department of Public Welfare*. 387 Mass. at 323. The benefit to the plaintiff and the general benefit to public interests are relevant considerations, and compensable hours may be reduced if the time spent was wholly disproportionate to the interests at stake. *Stratos* v. *Department of Public Welfare*, 387 Mass. at 323. Nonetheless, the very reason for § 1988 is to encourage suits that are not likely to pay for themselves but are desirable because they vindicate important rights. *Stratos* v. *Department of Public Welfare*, 387 Mass. at 323. Thus, the fact that the fee is high in relation to damages, or that the suit did not confer broad benefits on the public should not result automatically in major restrictions on compensable hours. *Id.*

Where the plaintiff brings a number of claims on which he was unsuccessful, the hours spent on such claims may be excluded in calculating a reasonable fee if the unsuccessful claims are distinct in all respects from the successful claims. *Miller* v. *Commissioner of Correction*, 36 Mass. App. Ct. at 121. However, where all the claims made by the plaintiff were based on a common core of facts and the claim on which the plaintiff did not prevail was closely related to claims in which he did prevail, a fee should be awarded on all hours reasonably expended if the relief obtained justified the expenditure of attorney time. *Rogers* v. *Okin*, 821 F.2d 22, 25 (1st Cir. 1987); *Miller v. Commissioner of Correction*, 36 Mass. App. Ct. at 121. In the present case, the plaintiff did

not succeed in obtaining damages on either his negligence or § 1983 claim but as a result of his lawsuit, including the claim for injunctive relief, did obtain significant changes in the services provided to him by DMR. The § 1983 and negligence claims and claim for injunctive relief involved a common core of facts and were closely related. Accordingly, this Court discerns no reason to reduce the award of attorney's fees based on the result obtained, given that the plaintiff's suit vindicated important rights and vastly improved Mr. Newell's quality of life.

The plaintiff seeks to recover $85,754 in fees for the services of Attorney Sharp from October of 1995 through the completion of the contempt trial in September of 2000. This sum represents 427.48 hours of effort by Sharp, 8.5 hours of secretarial effort, and 2.5 hours of paralegal effort. Attorney Sharp billed a total of 159 hours between 10/10/95 and 12/22/98, which at an hourly rate of $175 totals $27,825. Attorney Sharp billed a total of 268.48 hours between 1/02/99 and 9/15/00, which at an hourly rate of $200 totals $53,696. In addition, this Court will include 2.5 hours of paralegal time at the reduced rate of $50 an hour, for a total of $125.

The plaintiff further seeks to recover $154,054.40 in fees for the services of Attorney Whitfield Sharp from September of 1995 through February of 2000. This sum represents 770.59 hours of efforts by Whitfield Sharp and 18.82 hours of secretarial effort. Attorney Whitfield Sharp billed a total of 546.25 hours between 9/14/95 and 9/17/1998, which at an hourly rate of $175 totals $95,593.75. Attorney Whitfield Sharp billed a total of 221.18 hours between 12/6/99 and

2/3/00, which at an hourly rate of $200 totals $44,236. In addition, Attorney Whitfield Sharp billed 2.5 hours at an hourly rate of $25, for a total of $62.50, and billed 66 hours at an hourly rate of $20, for a total of $13.[5] Finally, Attorney Whitfield Sharp billed 18.82 hours at the secretarial rate of $35, for a total of $658.70. Thus, at the reduced hourly rate which this Court deems reasonable, the plaintiff could potentially recover $81,696 for the work performed by Attorney Sharp and $140,563.97 for the work performed by Attorney Whitfield Sharp.

Nonetheless, it is well established that an award under § 1988 may exclude time spent which is duplicative, unnecessary, or unproductive. *Society of Jesus of New England* v. *Boston Landmarks Commission*, 411 Mass. at 760; *Draper* v. *Town Clerk of Greenfield*, 384 Mass. at 457. Although it was reasonable for counsel to desire the assistance of co-counsel in this case, it was not necessary to have two attorneys working on the same tasks, nor should such duplication of effort be charged to the defendant. Where this Court deems efforts by the two attorneys to be duplicative, it will allow fees for the greater expenditure of time. On October 8, 1995, Attorney Whitfield Sharp billed 1.83 hours for complaint revisions and edits and running a LEXIS query on the *Youngberg* decision and 1st Circuit related cases. On October 10, 1995, Attorney Sharp billed .83 hours for the exact same task complaint edits and revisions and running a LEXIS query on the *Youngberg*

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5. It is not entirely clear why such a low hourly rate was charged on these occasions; however, the time spent involved largely administrative tasks such as travel, copying and faxing.

decision and 1st Circuit related cases. This Court, in its discretion, reduces the fee award by the lesser expenditure of time, for a reduction of $145.25.

Further, this Court deems it unreasonable and unnecessary, for purposes of the present fee award, to require the defendant to pay for the attendance of two attorneys at various proceedings. For example, on December 7, 1995, Attorney Sharp billed 2.83 hours for a court hearing on future filings, while Attorney Whitfield Sharp billed 2.5 hours for attending the court hearing. This Court, in its discretion, reduces the award by the lesser expenditure of time, for a reduction of $437.50. Similarly, on January 12, 1996, Attorney Sharp billed 5.2 hours for argument on the preliminary injunction in Dedham Superior Court, while on that same date, Attorney Whitfield Sharp billed 4 hours for a status hearing before Judge Neel in Dedham Superior Court. This Court will reduce the fee award by the lesser expenditure of time, for a reduction of $700. Further, on August 23, 1996, Attorney Sharp billed 7 hours for preparing for and attending a pre-trial conference, while Attorney Whitfield Sharp billed 4.5 hours for attending this conference. This Court will reduce the award by the lesser expenditure of time, for a reduction of $787.50. Finally, on March 5, 1997, Attorney Sharp billed 2.5 hours for traveling to Boston to take the deposition of Catherine Doherty, while on that same date, Attorney Whitfield Sharp billed 2.0 hours for the Doherty deposition. In the view of this Court, it was not necessary for both attorneys to attend this deposition. Accordingly, the award will be reduced by the lesser expenditure of time, for a reduction of $350.

Further, both attorneys billed numerous hours for time spent in court during the jury trial in this matter. Although there may be some benefit to having two lawyers prepare for and attend trial, the court may deem the second lawyer duplicative and unnecessary when assessing a fee award under § 1988. *Society of Jesus of New England v. Boston Landmarks Commission*, 411 Mass. at 760. The plaintiff was entitled to have both his attorneys present at trial; however, he was not entitled to do so at DMR's expense. Thus, this Court in its discretion will reduce the fee award by the lesser expenditure of time. On December 14, 1999 Attorney Sharp billed 16 hours for trial and trial preparation, while Attorney Whitfield Sharp billed 14 hours for trial and trial preparation; this Court will thus reduce the award by $2,800. On December 15, 1999, Attorney Sharp billed 12.17 hours for trial and trial preparation, while Attorney Whitfield Sharp billed 14 hours for trial and trial preparation; this Court will thus reduce the award by $2,434. On December 16, 1999, Attorney Sharp billed 18 hours for trial and trial preparation, while Attorney Whitfield Sharp billed 14 hours for trial and trial preparation; this Court will thus reduce the award by $2,800. On December 17, 1999, Attorney Sharp billed 4.67 hours for trial, while Attorney Whitfield Sharp billed 14 hours for trial and trial preparation; this Court will thus reduce the award by $934.[6] On December 21, 1999, Attorney Sharp billed 14.67 hours for trial and trial preparation, while Attorney Whitfield Sharp billed 12 hours for trial and trial preparation; this Court will thus reduce the award by $2,400. This Court, in its discretion, thus awards the plaintiff a total attorney's fee award of $208,471.72 for the services of Attorney Sharp and Attorney Whitfield Sharp.

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6. It should be noted that only Attorney Sharp billed for work on December 20, 1999.

The plaintiff further seeks $7,494.08 in costs incurred from November 6, 1995 to September 15, 2000. Section 1988 authorizes an award to a prevailing party of reasonable and necessary costs and expenses. *Culebras Enters. Corp.* v. *Rivera-Rios*, 846 F.2d 94, 103 (1st Cir. 1988); *Guckenbemer* v. *Boston University*, 8 F. Supp.2d 91, 111 (D. Mass. 1998). The award may include not only necessary trial costs, such as filing fees, but also reasonable out-of-pocket costs incurred by counsel, such as copying, faxing, telephone charges and travel expenses. *Palmigiano* v. *Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983); *Guckenberger v. Boston University*, 8 F. Supp.2d at 111. The plaintiffs itemization of expenses contains routine items, and this Court does not discern any unnecessary or unreasonable entries. Accordingly, this Court will award the full amount sought. Hence, this Court, in its discretion, awards the plaintiff a total of $208,471.72 in attorney's fees and $7,494.08 in costs pursuant to 42 U.S.C. § 1988.[7]

III. PLAINTIFF'S COMPLAINT FOR CONTEMPT

BACKGROUND

The plaintiff filed a complaint for civil contempt on May 31, 2000, alleging that DMR has failed to comply with a March 29, 2000 order of this Court. DMR has never filed an

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7. The plaintiff has filed a separate motion for an interim award of fees. Insofar as this case has now reached its conclusion, except for any appellate process, this Court does not view an interim award of fees as warranted. See *Hanrahan* v. *Hampton*, 446 U.S. 754, 674 (1980); *Brewster* v. *Dukakis*, 544 F. Supp. 1069, 1073 (D. Mass. 1982).

answer to that complaint. A hearing on that complaint was held on September 6, 8 and 15, 2000. At issue in the complaint is really whether DMR complied with the court's order of March 29, 2000 that DMR include two provisions in Newell's ISP and comply with the substance of those provisions, that on or before April 30, 2000, Newell be provided with a private room at the Benjamin Health Center and one-on-one care for approximately 25 hours each week.

FINDINGS OF FACT

This Court incorporates by reference the findings of fact made *supra* and makes the following additional findings of fact:

At the hearing on March 29, 2000, this Court asked DMR to provide Newell with "approximately 25 hours a week of one-on-one on both days that he attends BCTS and days that he does not, depending upon what is appropriate, available, and the plaintiff's needs." This was to be done no later than April 30, 2000. This Court also asked DMR to provide Newell with a private room no later than April 30, although the court expressly stated that this was not a guaranty that the plaintiff was to have a private room forever. Also at the hearing on March 29, the court directed DMR to amend its ISP to include the substance of Jeffrey Kielson's March 9, 2000 letter to Eve Ross indicating that at the present time, Newell would have a private room at DMR's expense until an appropriate roommate is found, and would include the provision of one-on-one services.

Appendix B

On September 6, 2000, Mary Reyenger testified that she was present at the court hearing on March 29, 2000 and understood, and I find that she understood, as Newell's service coordinator at DMR, that this Court had ordered that one-on-one services for approximately twenty-five hours a week would be in place by April 30, 2000, a date she had volunteered to this Court as one by which DMR could have both services in place. She wrote a memo to the DMR Regional attorney, Jackie Berman, to this effect.

The hearing on September 6, 2000 was continued to September 8, 2000 in order to obtain the transcript of the March 29, 2000 bearing. After receiving three pages of that transcript on September 7, 2000, plaintiffs counsel requested that the hearing be continued further so that the entire transcript of the March 29, 2000 hearing could be obtained.

At the continuation on September 8, 2000, Ms. Reyenger could not recall whether the court ordered on March 29, 2000 that one-on-one be provided to the plaintiff by April 30, 2000 or just that DMR agreed to provide it by April 30, 2000. Ms. Reyenger indicated, and I find, that she understood that on March 29, 2000, the court directed that Newell was to receive approximately 25 hours a week of one-on-one care, both on days that he goes to the Boston Center and on days that he does not.

The civil contempt complaint was served on DMR on June 1, 2000. As a result of DMR being served with that complaint for contempt, Reyenger received a telephone call from DMR supervisor Jeff Kielson and DMR attorney

Berman and specific directives from them to "get the one-on-one into gear," as well as providing Newell with a private room. As a direct result of being served with the complaint for civil contempt, Newell was moved on June 5, 2000 to a private room at the Benjamin Health Center. Newell was thus deprived of a private room from April 30 to June 4, 2000. The cost of a private room to DMR would have been $184.38 per day, for 36 days, for a sum of $6,637.68. Also as a direct result of DMR being served with the complaint for civil contempt, Newell started receiving one-on-one care on June 16, 2000. Newell was thus deprived of approximately 25 hours per week of one-on-one services from the period from April 30, 1990 to June 16, 2000. This amounts to 210 hours of service over the course of the six week period. The cost of such services is approximately $20 per hour, for a sum of $4,200.

Ms. Reyenger had understood that in April of 2000 he was getting one-on-one care while at Benjamin Health Center. I find that she called Benjamin weekly and was not informed of any problem with respect to the plaintiffs care. She did not directly ask whether Benjamin was providing one-on-one care to Newell; she simply understood that it was even though Bugden had told her at the earlier meeting that because of Benjamin staffing, he did not expect that Benjamin would be able to provide one-on-one care to the plaintiff. Ms. Reyenger had, before 4/30/00, made arrangements so that DMR funding was in place for approximately 25 hours each week. The funding was in place to provide Newell with one-on-one care by April 30, and Reyenger assumed, without being explicitly told or even asking, that Benjamin was

providing it. It was not until after DMR was served with the complaint for civil contempt that Ms. Reyenger directly asked Benjamin about Newell's one-on-one care and found out that Benjamin was not proving one-on-one to the plaintiff. Ms. Reyenger then contacted Eve Ross who still wanted the one-on-one care to be provided through the Benjamin Health Center. Ms. Reyenger undertook to find other agencies who could provide one-on-one while Newell was living at Benjamin.

This Court finds that Mary Reyenger did not wilfully violate this Court's order. Rather, Reyenger mistakenly believed that DMR was in fact complying with the one-on-one care requirement and once she learned otherwise, made appropriate efforts to provide Newell with the required services, although that did not occur until June. Nonetheless, Ms. Reyenger is not the only DMR representative implicated in this case. In addition to counsel for DMR, who clearly knew of the court's order, the exhibits presented to this court demonstrate that other DMR officials, including Jackie Berman, Jeff Keilson and Dimitri Triantafillakis, were aware of the court order and the April 30, 2000 deadline; yet without excuse[8] failed to comply.

During the weeks respectively of July 2, July 9, July 16, July 23, July 30, August 6, August 13, August 20, August 27 and September 3, Newell has received, respectively, 9 hours, 18 hours, 24 hours, 21 hours, 21 hours, 25 hours, 25 hours, 25 hours, 25 hours and 20 hours of one-on-one care.

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8. DMR has not argued that it was unable to comply by April 30. DMR itself chose that date at the hearing and funding was in place by that date.

Appendix B

Concerning DMR's failure to comply with the court order that DMR complete an ISP which incorporates the current provision to Newell of both a private room and approximately 25 hours a week of one-on-one care, DMR did not produce an ISP incorporating the private room requirement until June 13, 2000. Moreover, although that ISP mentions one-on-one care, it does not specifically state that such care is to be provided on both days that Newell attends BCTS and days he does not. This Court finds that DMR willfully and without excuse failed to obey this Court's order to incorporate such provisions into Newell's ISP.

RULINGS OF LAW

Unlike its criminal counterpart, civil contempt is not punitive but rather, is remedial and coercive, intended to achieve compliance with an order or decree of the court for the benefit of the complainant. *Demoulas* v. *Demoulas Super Markets. Inc.*, 424 Mass. 501, 565 (1997); *Commonwealth* v. *Rape Crisis Services of Greater Lowell*, 416 Mass. 190, 193 (1993); *Furtado* v. *Furtado*, 380 Mass. 137, 141 (1980). In order to hold a party in civil contempt, the judge must find a clear and undoubted disobedience of a clear and unequivocal command of the court. *Judge Rotenberg Educ. Ctr., Inc.* v. *Commissioner of the Dept. of Mental Retardation (No.1)*, 424 Mass. 430, 442-443 (1997); *Allen* v. *School Committee of Boston*, 400 Mass. 193, 194 (1987). Where the underlying order is ambiguous or the disobedience is doubtful, there cannot be a finding of contempt. *Judge Rotenberg Educ. Ctr.. Inc.* v. *Commissioner of the Dept. of Mental Retardation (No. 1)*, 424 Mass. at 443. The burden of proof in a civil contempt action is on the complainant to

prove his case by a preponderance of the evidence. *Judge Rotenberg Educ. Ctr., Inc.* v. *Commissioner of the Dept. of Mental Retardation (No. 1)*, 424 Mass. at 443; *Manchester* v. *Department of Environmental Quality Engineering*, 381 Mass. 208, 212 (1980).

The plaintiff first contends that DMR is in contempt of the March 29, 2000 order by failing to provide him with 25 hours per week of one-to-one care and a private room beginning no later than April 30. The March 29 order requiring the provision of such services by April 30 was a clear and unequivocal command of the court. Although this Court used the phrase "ask" in connection with these requirements, DMR understood that the court was, in fact, ordering it to comply with the "request" that such services be provided.[9] Further, there was clear and undoubted disobedience by DMR of this Court's order. Even assuming that the delay in obedience was due to nothing more than administrative "foot-dragging," it is well established that good faith, the absence of willful disobedience, and lack of intent to violate a court order are not defenses to a charge of contempt. *Judge Rotenberg Educ. Ctr., Inc.* v. *Commissioner of the Dept. of Mental Retardation (No. 1)*, 424 Mass. at 423; *United Factory Outlet, Inc.* v. *Jays Stores Inc.*, 361 Mass. 35, 37 (1972). Accordingly, the plaintiff has met his burden of establishing by a preponderance of the evidence that DMR is in contempt of this Court for its failure to provide Newell

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9. In so ordering, this Court was requiring nothing more than what DMR had already agreed to provide, as evidenced by Jeffrey Keilson's letter of March 9, 2000 and the testimony of Mary Reyenger. DMR's only unwillingness was to specifically incorporate these two provisions into Newell's ISP.

with one-on-one care and a private room by April 30, 2000, both of which DMR had agreed to provide.[10]

The plaintiff further contends that DMR is in contempt of the March 29, 2000 order by failing to incorporate the one-on-one care and private room requirements into the plaintiff's IPS until June. DMR argues that the court's order did not specify a date by which the ISP was to be so amended. It is well established that in ruling on a complaint for contempt, the court cannot read additional terms into an order or expand the scope of the order beyond its plain meaning. *Judge Rotenberg Educ. Ctr., Inc.* v. *Commissioner of the Dept. of Mental Retardation (No.1)*, 424 Mass. at 448-449. Because the March 29, 2000 order did not specify a deadline for amending Newell's ISP, it was ambiguous, and cannot sustain a finding of contempt. See, e.g., *Hinds* v. *Hinds*, 4 Mass. App. Ct. 63, 66 (1976) (finding no contempt for failure to convey certain property where the parties' divorce decree did not specify the time within which the property was required to be conveyed).

Nonetheless, with respect to the provision of one-on-one care, it appears that DMR has not yet incorporated the specific language agreed to by DMR and ordered by this Court. As was specifically stated at the hearing, the current provision by DMR of these services to the plaintiff, a private room and approximately 25 hours a week of one-on-one care, are not a guarantee that they, or either of them, will

10. However, I decline to determine that DMR was in violation of the court order once DMR began providing the plaintiff with one-on-one care, even though at times the number of hours of one-on-one care varied from approximately 25.

necessarily be included in future annual ISPs. Accordingly, this Court will again order DMR to do so, within twenty days of the entry of this decision.

Judicial sanctions in civil contempt proceedings may be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order and to compensate the complainant for losses suffered because of disobedience to the court's order. *Warren Gardens Housing Cooperative* v. *Clark* 420 Mass. 699, 701 (1995); *Gianetti* v. *Thomas*, 32 Mass. App. Ct. 960, 961-962 (1992). An appropriate remedy for civil contempt may include compensation for pecuniary harm caused by the contemptuous act *Allen* v. *School Committee of Boston*, 400 Mass. 193, 195 (1987); *Manchester* v. *Department of Environmental Quality Engineering*, 381 Mass. at 215. A compensatory fine may not exceed the actual amount of loss to the plaintiff caused by the defendant's violation of the court's order. *Manchester* v: *Department of Environmental Quality Engineering*, 381 Mass. at 215. Although such a fine need not be measured with undue precision, there must be some indication of the extent to which the plaintiff has been injured before a compensatory fine may be ordered. *Darmetko* v. *Boston Housing Authority*, 372 Mass. 758, 763 n. 7 (1974); *Manchester* v. *Department of Environmental Quality Engineering*, 381 Mass. at 215; *Arch Medical Associates. Inc.* v. *Bartlett Health Enterprises. Inc.*, 32 Mass. App. Ct. at 408. In the present case, Newell was deprived of a private room from April 30 to June 4, 2000. The cost of a private room to DMR would have been $184.38 per day, for 36 days, for a sum of $6,637.68. Newell was further deprived of approximately 25 hours per week of one-on-one services from

the period from April 30, 1990 to June 16, 2000. This amounts to 210 hours of service over the course of the six week period. The cost of such services is approximately, $20 per hour, for a sum of $4,200.

Finally, the plaintiff seeks the costs and attorney's fees associated with bringing the present contempt action. Generally, costs and attorney's fees are an appropriate remedy in a contempt proceeding to compensate the plaintiff for the expenses incurred as a consequence of the defendant's violation of the court order. *Demoulas* v. *Demoulas Super Markets. Inc.*, 424 Mass. at 571; *Eldim. Inc.* v. *Mullen*, 47 Mass. App. Ct. 125, 131 (1999). However, this general principle does not negate Mass. R. Civ. P. 54(d) that an award of costs against the Commonwealth requires specific, affirmative authority. *Judge Rotenberg Educ. Ctr., Inc.* v. *Commissioner of the Dept. of Mental Retardation (No. 1)*, 424 Mass. at 468.[11] Accordingly, this Court lacks the authority to order DMR to pay the plaintiff's attorney's fees and costs as compensation for being forced to bring suit to enforce the March 29, 2000 order.

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11. It should be noted that G.L. c. 261, § 14 authorizes costs against the commonwealth in actions and proceedings instituted by or in the name of the commonwealth. See, e.g., *Commonwealth* v. *One 1987 Ford Econoline Van*, 413 Mass. 407, 414-415 (1992) (ordering commonwealth to pay attorney's fees in a contempt action, where the commonwealth had instituted the underlying forfeiture proceeding). However, the statute does not extend liability for costs and fees to actions naming the commonwealth as a defendant. See *Judge Rotenberg Educ. Ctr., Inc.* v. *Commissioner of the Dept. of Mental Retardation (No. 1)*, 424 Mass. at 468.

Appendix B

ORDER

For the foregoing reasons, it is hereby *ORDERED* that the plaintiff's application for injunctive relief be *DISMISSED* as moot. It is *ORDERED* that pursuant to 42 U.S.C. § 1988, judgment shall enter for plaintiff Louis Newell, by his guardian Eve Ross, for reasonable attorney's fees in the amount of two hundred eight thousand, four hundred seventy-one dollars and seventy-two cents ($208,471.72) and reasonable costs in the amount of seven thousand, four hundred ninety-four dollars and eight cents ($7,494.08) against the defendant Department of Mental Retardation.

It is further *ORDERED* that on the complaint for contempt, judgment shall enter for plaintiff Louis Newell, by his guardian Eve Ross, against defendant Department of Mental Retardation in the amount of ten thousand dollars, eight hundred and thirty-eight dollars and sixty eight cents ($10,837.68). The Department of Mental Retardation is hereby *ORDERED* to amend Mr. Newell's latest Individual Support Plan within thirty days of the entry of this order to state that "Mr. Newell will have approximately 25 hours a week of one-on-one assistance on both those days that he attends BCTS and those days he does not, depending on what is appropriate, what is available, and his needs."

s/ Elizabeth M. Fahey
Elizabeth M. Fahey
Justice of the Superior Court

DATED: December 1, 2000

Supreme Court, U.S.
FILED
AUG 18 2006
OFFICE OF THE CLERK

(2)

No. 05-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 2006

LOUIS NEWELL
Petitioner,

v.

MASSACHUSETTS DEPARTMENT OF
MENTAL RETARDATION
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS F. REILLY
Attorney General
of Massachusetts

RONALD F. KEHOE*
Assistant Attorney General
1 Ashburton Place, Room 1813
Boston, Massachusetts 02108
(617) 727-2200, ext. 2619
**Counsel of Record*

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Judicial Court of Massachusetts correctly concluded that a litigant was not eligible for attorney's fees as a prevailing party under 42 U.S.C. §1983 and the *Buckhannon* decision, where no oral or written orders for judicial relief were made?

2. Whether a factual finding that a litigant is a member of a class under a consent decree, unaccompanied by a finding that his rights as a class member were violated, or by a remedial order, is sufficient judicial imprimatur for a fee award under *Buckhannon*?

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondent Massachusetts Department of Mental Retardation ("DMR") submits this brief in opposition to the petition for certiorari.

Decisions Below

The opinion of the Supreme Judicial Court of Massachusetts is reported at 446 Mass. 286, 843 N.E.2d 1084 (2006), and is included in Appendix A to the petition at pages 1a-34a. The earlier decision of the Superior Court of Massachusetts is unreported, and is included in Appendix B to the petition at pages 35a-65a.

Statement of the Case

An accurate statement of the case appears in the opinions of the lower courts, reproduced in Appendix A and Appendix B of the petition. For reasons stated below, the petition does not accurately state the facts of the case or the rulings of the lower courts.

Reasons for Denying the Writ

I. RULE 15.2 OBJECTION: THE PETITION MATERIALLY MISSTATES THE FACTS AND LAW

The respondent objects to the Court's consideration of the questions allegedly presented by the petition on the ground (Rule 15.2) that the petition misstates the facts, the findings and rulings of the trial court, and the holding of the Supreme Judicial Court. When the misstatements are stripped away, it becomes apparent that the questions allegedly presented for this Court's consideration are not, in fact, presented by this case.

A. *No Judicial Imprimatur Warrants a Fee Award.*

The petition alleges that a split exists among the circuits as to what kind of an order for judicial relief will establish the "judicial imprimatur" required by the decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001). Whether or not a split in authority exists, it is irrelevant to the facts of the present case.

1. No Order Was Ever Made.

The Supreme Judicial Court found and ruled, as had the trial court, that no court order, oral or written, had ever been made in this case granting any form of relief to the petitioner. Contrary to the petition's misstatements, the court did not rule that oral orders cannot provide "judicial imprimatur" for *Buckhannon* purposes. *Newell v. Department of Mental Retardation*, 446 Mass. 286

(2006). Pet. 1a-34a.

Before *Buckhannon* was decided, the trial court found the plaintiff to be a "prevailing party" and awarded legal fees, solely on the basis of the later-discredited catalyst theory. Pet. 16a, 43a-47a. The judge expressly found that "the plaintiff vindicated his rights without obtaining court-ordered relief." Pet. 16a, 47a (emphasis added). The fee award was based on a change in the legal relationship between DMR and the petitioner when they agreed on the services to be provided and the wording of his Individual Service Plan ("ISP"). The court found that this agreement had come about as "the product of pressures exerted by the present lawsuit," not as the result of any judicial order. Pet. 46a.

After *Buckhannon* was decided, the judge vacated the fee award and reaffirmed that it had been made solely on the basis of the catalyst theory, and for that reason no longer had any legal basis. Pet. 16a-17a.

The alleged oral orders on which the petition relies came during colloquies on February 10, February 17 and March 29, 2000 between the trial judge and the parties and their counsel. In the case of such a colloquy, where no written order is made, the trial court's later finding that no oral order for relief was made is entitled to considerable deference on appeal. The Supreme Judicial Court cited the First Circuit standard of review of such a finding:

> We review a district court's grant or denial of attorneys' fees for manifest abuse of discretion, mindful that the district court has an intimate knowledge of the nuances of the underlying case. Such deference is particularly

> appropriate where, as here, the correctness of the court's decision depends in large part on the proper characterization of its own statements. Clearly, the district court is in the best position to determine whether its statements . . . should be considered as the functional equivalent of a judicial order within the meaning of *Buckhannon*.

New England Regional Council of Carpenters v. Kinton, 284 F.3d 9, 30 (1st Cir. 2002), cited in the decision below at Pet. 20a-21a & n.28.

2. The Court Denied Fees Because No Order was Made, Not because an Oral Order is Insufficient.

The Supreme Judicial Court held that the trial judge's oral statements from the bench were not orders at all. At the February and March 2000 hearings, the judge sought to play the role of mediator in bringing the parties to agreement on the only disputed issue, the petitioner's demand for the addition of two specific services to his ISP, Pet. 22a. The judge resolved the dispute by cajoling and sometimes directing DMR to *reach agreement* with petitioner on specific terms. Id.

The judge made no order of any kind, either oral or written, that decided the dispute or prescribed the services to be provided and incorporated in the ISP. Id. By the time of the March 29 hearing, the parties had already agreed on the services and the amended ISP wording. The trial court for that reason dismissed the petitioner's motion for injunctive relief as moot. Pet. 43a, 45a. Further, "[N]o settlement agreement was drafted or executed, and

no order incorporating any such terms was entered." Pet. 23a.

The Supreme Judicial Court expressly ruled that an oral order can be enforced by contempt, but concluded from its review that the transcript "contains nothing resembling an order that the department implement specific services by April 30," Pet. 29a-30a, and "it does not appear that the judge ever ordered anything." Pet. 31a (emphasis added). The court said that the trial judge had indicated "that she was merely 'asking' the department to do what the department had, on its own, already 'agreed to.'" Id. "At most, the judge had exerted pressure on the department to prevent it from backing off its prior agreement with respect to those two modifications." Id.

The petition materially misstates these facts. The Supreme Judicial Court ruled that no order had been made, not that an oral order cannot provide judicial imprimatur for Buckhannon purposes. It did not reach any issue which has split the circuits. No question about the effect of an oral order is presented for this Court's consideration.

3. The Petition Selectively Quotes and Misstates the Decision Below.

The petition misstates the holding of the Supreme Judicial Court. Arguing that oral orders had changed the legal relationship between the parties and thereby constituted "judicial imprimatur," the petition incorrectly asserts: "The court still erroneously found that oral orders could never provide the 'judicial imprimatur.'" Pet. 22. Petitioner calls this alleged finding "a misstatement of the controlling federal law. (S.C. Rule 10)." Pet. 20. These assertions misstate the lower court's decision.

The misstatement is most striking in the petitioner's selective quotations from the decision below. The Supreme Judicial Court, after noting post-*Buckhannon* decisions among the circuits discussing whether a judgment on the merits or a court-ordered consent decree are the only forms of relief that meet the "judicial imprimatur" requirement, distinguished the present case as not presenting an inter-circuit dispute:

> Whatever the ultimate resolution of that question, no court has concluded that oral statements by a judge, ***sometimes couched in hortatory rather than directive terms and*** not reduced to writing, are sufficient to satisfy the requirement of a 'judicial imprimatur.' **To the extent a claim similar to the one the plaintiff makes here has been asserted, it has been rejected. See, e.g., *New England Regional Council of Carpenters v. Kinton, supra,* (judge's statements in 'extended colloquy' with defendant were not 'functional equivalent of a judicial order' where judge entered 'no explicit order compelling, or even leading to' change in defendant's behavior).**

(emphasis added). Pet. 20a-21a, citing and following *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 23 (1st Cir. 2005) and *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002).

The petition quotes only a portion of one sentence of this language, omitting all of the boldfaced text above. Its omission of the phrase, "hortatory rather than directive terms," and of the two following sentences (reviewing courts defer to a trial judge's

characterization of her own remarks in an oral colloquy) changes what the court actually said -- that no order or the functional equivalent of an order was in fact made -- into a spurious question -- whether oral orders can ever give rise to "judicial imprimatur."

The latter question is not presented by this case, and the Supreme Judicial Court made no ruling on it.

B. *The Finding of Ricci Class Membership Did Not Materially Alter the Legal Relationship of the Parties*

The petition misleadingly characterizes the plaintiff's lawsuit as an attempt to enforce the consent decree in *Ricci v. Okin*, 823 F.Supp. 984 (D. Mass. 1993). It cites the trial court's finding that petitioner is a member of the *Ricci* class and argues that this confers "prevailing party" status on him. Petitioner misstates the effect of the finding. Pet. 15-20, 23.

The court made a bare factual finding of class membership, unaccompanied by any order for relief or by a finding that petitioner's *Ricci* rights had been violated. Pet. 38a. The Supreme Judicial Court held that the finding of class membership did nothing to materially alter the relationship which the *Ricci* consent decree had previously established between petitioner and DMR. Pet. 7a n.11, 26a-28a. As the court stated, "The plaintiff either is or is not a Ricci class member; there is no judicial imprimatur that changed the legal relationship of the parties." Pet. 28a.

Petitioner alleges that the finding will give him a procedural advantage over non-*Ricci* DMR clients if DMR reduces or ends his services in the future, because he will be able to bypass the state administrative appeal process and proceed directly to court

in a contempt action. Pet. 22. The argument assumes that the finding of class membership is an order. Because no order of any kind was ever made, Pet. 31a, *ipso facto* there would be no basis for a contempt action based on the finding of class membership. Pet. 29a. Moreover, the possibility of relief in the future would not support a fee award now.

The argument also misstates the terms of the consent decree, which expressly requires that "individual ISP disputes shall be enforced solely through the state ISP process." *Ricci v. Okin*, 823 F. Supp. at 988, ¶7(a).[1] Nothing in the consent decree supports the petitioner's claim that the finding of class membership allows him to bypass those procedures by a contempt action.

Nothing turned on whether the petitioner is a member of the *Ricci* class. This case for that reason is distinguishable from the decided "enforcement" cases cited in the petition. Pet. 16-19.

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUE OF FEDERAL LAW REQUIRING RESOLUTION BY THIS COURT

The petition presents nothing more than the petitioner's disagreement with the trial judge's factual finding that she had

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[1] The consent decree provides "special eligibility" status for class members, which entitles them to the same services as DMR clients with "general eligibility," with two exceptions not here relevant. See *Newell*, 446 Mass. at 305 n.34, Pet. 27a. Special eligibility clients have the same procedural rights as general eligibility clients, as set forth in the Massachusetts Code of Regulations, 115 CMR 6.31. Neither of the "special eligibility" exceptions for *Ricci* clients expands these procedural rights.

made no order granting him relief, and with the Supreme Judicial Court's deference to that finding in affirming the denial of fees. The petition cites no authority contrary to the holdings of the First Circuit and the Supreme Judicial Court that give deference to a trial judge's characterizations of her own oral statements. There is no circuit split and no "misstatement of the controlling federal law" by the Supreme Judicial Court, as petitioner asserts. Pet. 20.

The Supreme Judicial Court's holding that the mere finding of *Ricci* class membership did not materially alter the parties' relationship also presents no circuit split, and no material issue of federal law requiring resolution by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MASSACHUSETTS DEPARTMENT
OF MENTAL RETARDATION
By its attorney,

THOMAS F. REILLY
Attorney General
of Massachusetts

RONALD F. KEHOE*
Assistant Attorney General
1 Ashburton Place, Room 1813
Boston, Massachusetts 02108
(617) 727-2200, ext. 2619
**Counsel of record*

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